No. 86-439

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,

Debtor.

CENTURY BRASS PRODUCTS, INC.,

Petitioner,

—against—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

If an employer and a union are parties to a collective bargaining agreement that provides benefits to retired employees, and modifications in those benefits are necessary to permit the employer to reorganize under Chapter 11 of the Bankruptcy Code, is a proposal containing such modifications made to the union a proposal to the "authorized representative of employees covered by such agreement" within the meaning of 11 U.S.C. § 1113?

Parties to the Proceedings

The parties to the proceeding below were:

Plaintiff-Appellee: Century Brass Products, Inc.*

Defendants-Appellants: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1604.

Party-in-interest: The Century Brass Products, Inc., Official Committee of Unsecured Creditors participated below as a party-in-interest in support of Century Brass Products, Inc.

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*Century Brass Products, Inc. has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CENTURY BRASS PRODUCTS, INC.,

Petitioner,

—against—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Century Brass Products, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, entitled *Century Brass Products, Inc.* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Its Local 1604*, (App. A, 1a-24a) is reported at 795 F.2d 265 (2d Cir. 1986). The opinion of the District Court for the District of Connecticut (App. B, 25a-34a) appears at 55 Bankr. 712 (D. Conn. 1985). The opinion of the Bankruptcy Court for the District of Connecticut (App. C, 35a-61a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1986 (App. D, 62a-63a). That Court denied a timely peti-

tion for rehearing on August 13, 1986 (App. E, 64a-65a), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

11 U.S.C. § 1113 is reprinted in Appendix F.

Statement of the Case

After a series of losses and projections for continued losses, Century Brass Products, Inc. ("Century") filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code on March 15, 1985. Modifications to the collective bargaining agreement were necessary to permit reorganization to proceed. (App. C at 52a). As a result, Century and the Union engaged in a series of bargaining sessions during April and May. Since the number of retirees covered by the labor contract is more than twice the number of active employees, it was necessary that Century's proposals include modifications affecting both groups. (App. C at 55a). A failure to adjust retiree benefits would have placed an inequitable burden on active employees and likely have led to a failure of the reorganization. (App. A at 20a). Therefore, Century proposed adjustments in both active and retired employees' benefits. (App. C at 43a-46a). However, the Union refused to negotiate because of the proposed changes in retirees' insurance.

Century then filed an application to reject the collective bargaining agreement under 11 U.S.C. § 1113. The Bankruptcy Court opened the hearing within the fourteen day time limit required by 11 U.S.C. § 1113(d)(1). Before approving Century's application the Bankruptcy Court was required to find that:

1. Century made a proposal to modify the collective bar-

gaining agreement to the authorized representative of its employees;

2. the proposal was based on the most complete and reliable information available at the time of the proposal;

3. the proposed modifications were necessary to permit Century's reorganization;

4. the proposed modifications treated all creditors, the debtor and all of the affected parties fairly and equitably;

5. Century provided the Union such relevant information as was necessary to evaluate the proposal;

6. between the time of the making of the proposal and the time of the hearing on rejection of the existing collective bargaining agreement, Century met at reasonable times with the Union;

7. at the meetings Century conferred in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

8. the Union refused to accept the proposal without good cause; and,

9. the balance of the equities clearly favored rejection of the collective bargaining agreement.

(App. C at 47a-61a).

The Union opposed Century's application, arguing primarily that: (i) although Century and the Union were the only parties to the contract, the Union was not the retirees' "authorized representative" within the meaning of 11 U.S.C. § 1113, and (ii) by attempting to negotiate over retirees' benefits Century had not bargained in good faith thereby giving the Union good cause to reject the proposals. As support for its position, the Union relied on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), where this Court held that under the National Labor Relations Act, 29 U.S.C. §§ 151

et seq. ("NLRA"), retirees' benefits are not mandatory subjects of bargaining because they do not "vitally affect" active workers.

In granting Century's application, the Bankruptcy Court found that Century had satisfied all statutory criteria. Specifically, it found that Century's proposal treated all parties fairly and equitably and that Century would liquidate if relief were not granted. (App. C at 60a-61a). With respect to the Union's *Pittsburgh Plate Glass* argument, the Bankruptcy Court stated:

> If a union seeks to negotiate benefits for its retirees and bankruptcy ensues, the union cannot call up the [*Pittsburgh Plate Glass*] doctrine, deny any responsibility for representation of the retirees, and, thereby, entirely frustrate §1113.
>
> * * *
>
> . . . The union, having voluntarily negotiated benefits for its retired members, has the accompanying responsibility, at least inititally, to act in the bankruptcy context as the retirees' representative under § 1113.

(App. C, at 58a-59a).

Relying on *Pittsburgh Plate Glass*, the Union presented the same arguments on appeal to the District Court. The District Court first rejected the argument that Century's insistence on negotiating retirees' benefits provided the Union with good cause to reject Century's proposals. It stated that even if *Pittsburgh Plate Glass* applied in Section 1113 proceedings, the retirees' benefits vitally affected active employees and were a mandatory subject of bargaining. (App. B at 27a-29a). With respect to the argument that the Union was not the authorized representative of retirees, the District Court stated:

> The union necessarily becomes the "authorized representative" of its retirees when it negotiates with the employer on their behalf and cannot later renounce that role when the employer seeks to modify the product of their negotiations under Section 1113.

> The court recognizes the difficulties that its holding may present for unions that wish to avoid conflicts of interest in their representation of their different constituencies. However, unions already must attempt to reconcile the conflicting interests of current and retired employees whenever they engage in collective bargaining on behalf of both groups outside the bankruptcy context. It is perhaps understandable that unions find such compromises less distasteful when they are dividing up gains rather than losses.

(App. B at 30a).

On further appeal by the Union, the Court of Appeals for the Second Circuit agreed with the Bankruptcy and District Courts that *Pittsburgh Plate Glass* did not control this case. It held that the union which negotiates and signs a collective bargaining agreement providing retirees' benefits is generally the retirees' authorized representative under Section 1113. However, departing "from a literal reading of § 1113," the Second Circuit went on to hold that a "conflict of interest" may prevent a union from serving as the retirees' authorized representative. The court stated that if "the suitability of representation on account of a conflict of interest is raised the bankruptcy court should make a determination as to whether a conflict actually exists. If a conflict is found, a representative for the class of retirees should be appointed by the bankruptcy judge." (App. A at 22a). The court then went even further and held that because Century's active employees had an interest in reducing the cost of benefits associated with retirees while Century's retirees had an interest in reducing their benefits as little as possible, a conflict of interest existed between the two groups as a matter of law. This conflict prevented the Union from serving as the retirees' authorized representative. (App. A at 23a). The court concluded that since Century had made its proposals to the Union and not to a representative of the retirees receiving benefits under Century's collective bargaining agree-

ment, it had not satisfied the procedural requirements of Section 1113.

Reasons For Granting Plenary Review

Introduction

Section 1113 represents a careful Congressional resolution of the conflict that previously existed between federal labor law, which encourages collective bargaining, and bankruptcy law, which seeks to take necessary steps to prevent liquidations and their resulting economic dislocation. Balancing the interests of both laws, Section 1113 requires a debtor to engage in an expedited form of collective bargaining with the union before modifying its labor agreement. If the bargaining does not succeed, the bankruptcy court *must* hear and decide an application to reject within brief, mandatory time limits. In a decision that affects virtually every proceeding under Section 1113, the Second Circuit interpreted the statute in a manner that completely undermines Congress's goals. The decision merits this Court's attention.

I.

The Decision Below Raises Important Issues Of Federal Law That Should Be Resolved By This Court.

A. The Expedited Process Mandated By Section 1113 Cannot Be Achieved

In *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513 (1984), this Court addressed the conflict that arises between the principles of the National Labor Relations Act and the Bankruptcy Code when an employer is forced to file a Chapter 11 petition. In a unanimous decision, the Court held that collective bargaining agreements were subject to rejection under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365, provided: (1) the

collective bargaining agreement was burdensome on the estate; (2) the equities balanced in favor of rejection; (3) reasonable efforts at a negotiated settlement were made and were not likely to produce a prompt, satisfactory solution; and, (4) the policy of permitting successful reorganizations would be furthered by allowing rejection. 465 U.S. at 526-27. In a 5-4 decision, the Court went on to hold that unilateral changes by an employer prior to court authorized rejection did not violate the NLRA. *Id.* at 527-34.

Demonstrating the extreme importance of the issues presented in *Bildisco*, Congress responded to the decision approximately four months later by enacting Section 1113. Section 1113 comprehensively addresses the issues surrounding rejection of collective bargaining agreements. As the Second Circuit recognized, Section 1113 only slightly modifies the first part of the *Bildisco* decision. However, Section 1113(f), which provides that nothing in Section 1113 should "be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section," reverses the second part of the *Bildisco* holding. The impact of this provision is softened by the accelerated bargaining and court proceedings mandated by Section 1113 and by Section 1113(e), which allows a bankruptcy court to authorize interim changes in a collective bargaining agreement prior to compliance with all of Section 1113's requirements.

The structure of Section 1113 demonstrates a compromise between the policies of labor law and bankruptcy law. The process created calls for an *expedited* form of collective bargaining followed, if need be, by an *expedited* court hearing on rejection. Two factors serve to demonstrate the emphasis on speed in negotiations. First, since the debtor need only negotiate between the time it makes its proposal and the date of the hearing on rejection, the entire bargaining process envisioned by Section 1113 may occur in as little as fourteen days. *See* 11 U.S.C. § 1113(b)(2). Second, unlike traditional bargaining

where a company presents an initial offer that leaves room for give and take, the debtor's proposal under Section 1113 must cut right to the heart of the matter and be limited to "necessary" modifications. Indeed, if the debtor makes a proposal that leaves room for substantial negotiation it runs the risk that its application will be denied because all of the proposed modifications were not necessary. The time frames set forth in the statute also demonstrate emphasis on speed in the bankruptcy court should negotiations fail. The bankruptcy court must normally begin the hearing within fourteen days of the filing of the application and must rule on the application within thirty days of the start of the hearing. If the bankruptcy court has not ruled within thirty days, the debtor may make unilateral changes. Congress contemplated that the entire process, from initial proposal to court decision, could take place in less than two months. This emphasis on speed serves to "prevent delays from jeopardizing the reorganization effort or damaging the estate." Statement of Senator Hatch, 130 Cong. Rec. S8891 (daily ed. June 19, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 590, 594.

The decision of the Second Circuit has a profound impact on this process. The decision effectively replaces the procedures envisioned by Congress, which focused on expedited private negotiations, with one that is long on delays and court hearings and short on prospects for successful negotiation.

If allowed to stand, the Second Circuit decision requires a debtor to go into bankruptcy court early and often. First there must be a hearing to determine if a debtor's proposal raises a "conflict of interest" for the Union. If a conflict exists, which is virtually assured, the court must then determine, presumably after another hearing, who shall be appointed the retirees' representative. Only after this process is complete can the debtor finally make its proposal and actual bargaining commence. Such a result clearly undermines the Congressional goal to create a process that maximizes speed and minimizes court involvement.

B. The Decision Will Impact Virtually Every Contract Modification

The decision below is not one of limited application. Virtually all collective bargaining agreements provide some type of benefits to retirees. The Bankruptcy Code does not afford these benefits any special status. In order to comply with Section 1113's mandate that its proposal treat *all* affected parties fairly and equitably, a debtor must propose that retirees participate in any concessions. Such a proposal must be made to the authorized representative of retirees. The Second Circuit held that "generally" this will be the union which has negotiated these benefits. Logically, however, the union will never be capable of serving as the authorized representative because under the Second Circuit's analysis there will always be a conflict of interest between retirees and actives (actives desiring to maximize reduction in retirees' benefits, retirees desiring to minimize reductions). The exception swallows the rule and the net result is the time-consuming process of appointing a separate authorized representative for retirees will be required in almost every case.

C. Participation Of Third Party Representatives In Employer-Union Negotiations Reduces The Prospects Of Success

The expedited procedure established by Section 1113 is workable because the parties to the contract are familiar with contractual terms and have established procedures for dealing with each other. The necessity of a separate authorized representative diminishes the prospects for successful negotiation, a primary Congressional goal. A retirees' authorized representative will be a third party to negotiations; a party that has not been involved in the ongoing collective bargaining relationship. The intrusion of this party into what are already extremely delicate negotiations can only serve to complicate matters. Rather than narrow issues, the Section 1113 process will multiply them. Such a result necessarily defeats congressional intent by making agreement less likely.

D. The Decision Raises A Series Of Unanswered Issues Which Must Be Resolved In Order For Financially Distressed Debtors To Survive

The Second Circuit's decision raises a host of issues which can only be resolved through costly and time-consuming litigation. Given the inevitability of such litigation and the uncertainty of its result, the prospects of convincing creditors to attempt reorganization rather than liquidation and of obtaining interim financing is diminished. For Century and other companies attempting to reorganize, failure to resolve these issues will be akin to economic capital punishment.

A number of these issues are readily apparent. For example, it is unclear from the opinion whether the company must present one proposal which contains all the modifications in the collective bargaining agreement or separate proposals to each authorized representative containing only those modifications that relate to that representative's constituents. It is unclear whether the retirees' representative serves the function of a negotiator or that of a guardian ad litem. If he is simply a negotiator, then any agreement he reaches must be ratified by the retirees. The opinion does not state whether all retirees must ratify this proposal or whether a majority will suffice. If the authorized representative is a traditional guardian ad litem rather than a negotiator, it is unclear when and how he must get court approval for his actions. It is also uncertain whether any court hearing on his actions will be in effect a mini-Section 1113 hearing. Finally, it is unclear whether the authorized representative will have the authority to bind all retirees or whether individual retirees will have the right to opt out of his representation and pursue individual claims against the debtor.

The decision also raises numerous questions concerning the interaction of the debtor, the two authorized representatives and Section 1113. For example, does the union, as the signatory to the collective bargaining agreement, have the power to

reject whatever agreement is reached between the retirees and the debtor by refusing to ratify the contract? What will happen if the debtor and the union reach an agreement concerning active employees, but the debtor and retirees' representative are unable to reach an agreement concerning retiree benefits? May the debtor then seek rejection under Section 1113 and, if so, is the entire contract subject to rejection? A similar issue is raised if the debtor is unable to reach an agreement with either representative and the bankruptcy court subsequently finds that one representative properly rejected the proposal and the other representative did not. In such a situation, is all, part or none of the collective bargaining agreement subject to rejection?

The Court also failed to address the role of this representative after the initial Section 1113 process has been completed. For example, if a debtor, the union and the retirees' representative are able to reach an agreement on concessions and the debtor subsequently performs profitably, does the union's "conflict of interest" prevent it from negotiating for the return of the retirees' benefits or must the independent representative also be involved in these negotiations? If the retirees' representative must be involved in these negotiations, at what point are his services no longer necessary? Finally, does the estate have to bear the additional financial burden of the representative's expenses?

Every debtor, creditors' committee or provider of financing contemplating a reorganization in which a Section 1113 proceeding is possible will confront these issues. The uncertainty that now exists can only serve to discourage attempts at reorganization. Only by the Court's prompt review of this matter can this frustration of Congressional intent be avoided.

In sum, the Second Circuit's decision turns Section 1113 on its head. The expedited process that Congress envisioned when it enacted this important legislation has been replaced by a procedural quagmire. Moreover, the decision raises such

uncertainty about the Section 1113 process that many companies will be forced to liquidate rather than reorganize. The important issues raised by the decision merit review.

II.

The Decision Of The Second Circuit Is Contrary To The Language And Legislative History Of Section 1113.

Neither the statute nor its legislative history supports the rule created by the Second Circuit. Section 1113 simply requires that a proposal be made to the employees' "authorized representative." Nowhere does it refer even to the possibility of more than one authorized representative. In fact, the Second Circuit conceded that its interpretation departed from a literal reading of the statute. (App. A at 22a). The legislative history, likewise, contains nothing to indicate that the proposal for modifications in the collective bargaining agreement should go to any entity other than the union which is the signatory to the contract. In fact, the legislative history indicates that the proposal only goes to the union. For example, Congressman Rodino stated that the negotiations "will take place between the employer and union," 130 Cong. Rec. H7489 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 576, 577; Senator Dole stated that the debtor must make a proposal "to the union representatives" and that the debtor must provide relevant information "to the unions," 130 Cong. Rec. S8889 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 586, 588; Senator Hatch stated that the "business must make an offer to its employees' union representatives," that the "employees' Union representative" must be given an opportunity to review and accept or reject a proposal, and that "the unions must not reject the business offer without good cause," 130 Cong. Rec. S8891 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News

590, 592, 593; and Senator Thurmond stated that the debtor must make a proposal "to the union" and that the "union" must not refuse to accept the proposal without good cause, 130 Cong. Rec. S8887 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 581, 583. In essence, the legislative history demonstrates that Congress used the terms "authorized representative" and "union" interchangeably.

The interchange of the words "authorized representative" and "union" cannot be brushed aside as congressional ignorance. Congress is certainly aware that virtually all collective bargaining agreements include retirements benefits. In fact, Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186 (c)(5), which authorizes collectively bargained retirement plans, requires such plans be administered by a joint *union*-employer board, not a tripartite union-employer-retiree board. Similarly ERISA, the primary federal statute involving retiree benefits, repeatedly refers to "labor unions." *See, e.g.*, 29 U.S.C. § 1002(4). Congress cannot be presumed to be ignorant of the entire federal statutory scheme when it set up Section 1113. Therefore, if it had intended to create a new rule of law whereby the debtor had an obligation to determine whether a conflict of interest existed between a union and retirees and then go to the bankruptcy court to seek appointment of an independent representative for the retirees for purposes of collective bargaining, some indication of this intent should have appeared in the language of the statute or its legislative history.

Congressional awareness of the impact of bankruptcy proceedings on collectively bargained for retirees' benefits is further demonstrated by the recent events surrounding LTV Corporation, which filed a Chapter 11 petition on July 17, 1986. Unlike Century, LTV discontinued retirees' insurance benefits prior to compliance with Section 1113. The Senate responded to this action by passing S. 2690, which specifically requires LTV to continue providing these benefits until it receives a court order to the contrary. S. 2690, 99th Cong., 2d Sess., 132

Cong. Rec. S9882 (daily ed. July 30, 1986).[1] Similar provisions were introduced to the House. H.R. 5276, 99th Cong., 2d Sess. (1986); H.R. 5283, 99th Cong., 2d Sess. (1986). This swift Congressional response demonstrates the extreme national importance of the issues raised here. A decision by this Court would clarify both the status of and proper method for handling retiree claims under Section 1113.

CONCLUSION

For all the foregoing reasons, Petitioner suggests that the important questions presented by this case warrant this Court's consideration. Therefore, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

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[1]Senate bill S. 2690 is applicable only to LTV. On the same day the Senate bill passed, LTV procured a court order authorizing the continuation of retirees' insurance payments, LTV took this action because of labor unrest among active employees. *See* 13 Bankr. Pens. Rep. (BNA) 1330.

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CENTURY BRASS PRODUCTS, INC.,

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—against—

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APPENDIX A

June 30, 1986—Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 752—August Term 1985

(Argued January 17, 1986 Decided June 30, 1986)

Docket No. 85-5092

IN RE: CENTURY BRASS PRODUCTS, INC.,

Debtor.

CENTURY BRASS PRODUCTS, INC.,

Plaintiff-Appellee,

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 1604,

Defendant-Appellant.

CREDITORS' COMMITTEE,

Party-in-Interest.

Before:

KAUFMAN and CARDAMONE, *Circuit Judges,*
and WYZANSKI, *District Judge.**

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*Honorable Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

June 30, 1986—Opinion of the United States Court of Appeals for the Second Circuit

Appeal from a judgment of the United States District Court for the District of Connecticut (Cabranes, J.) that affirmed an order of the Bankruptcy Court (Kreckevsky, B.J.) of July 26, 1985 allowing appellee, Century Brass Products, Inc., to reject a collective bargaining agreement it had with appellant, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 1604, in a bankruptcy reorganization pursuant to 11 U.S.C. § 1113 (Supp. II 1984). Appellant union argued that it could not adequately represent the interest of appellee's retired employees.

Reversed and remanded.

MICHAEL B. NICHOLSON, Detroit, Michigan (Jordan Rossen, International Union, UAW, Detroit, Michigan, of counsel), *for Defendants-Appellants.*

THOMAS M. CLOHERTY, Hartford, Connecticut (John M. Oleyer, Lissa J. Paris, Murtha, Cullina, Richter and Pinney, Hartford, Connecticut, of counsel), for *Plaintiff-Appellee.*

LEWIS K. WISE, Hartford, Connecticut (Jerome E. Caplan, Rogin, Nassau, Caplan, Lassman & Hirtle, Hartford, Connecticut, of counsel), *Pro Hac Vice for Creditors' Committee.*

CARDAMONE, *Circuit Judge:*

This appeal deals with one aspect of the existing tension between the Bankruptcy Code and the National Labor Relations Act. Today companies in financial distress often look to the bankruptcy court for protection from deregulation, litiga-

tion, ruinous international competition and other economic hardships. Under Chapter 11 of the Code a debtor may be allowed to modify its existing labor agreements and thereby reduce costs. On the other hand, to permit the unilateral rejection by an employer of a bargained for agreement flaunts national labor policy. On February 22, 1984 the Supreme Court decided *NLRB* v. *Bildisco & Bildisco,* 465 U.S. 513 (1984), which held that a debtor in bankruptcy did not commit an unfair labor practice by unilaterally terminating provisions of a collective bargaining agreement. The decision sparked intense congressional debate regarding the circumstances under which an existing labor contract could be rejected in Chapter 11 cases.

The institutional tension between labor and bankruptcy law culminated in the Senate when two bills were introduced: the first sponsored by Senator Packwood was hostile to the notion that employers in bankruptcy could unilaterally reject collective bargaining agreements or make more than minimal modifications in order to permit reorganization; the second presented by Senator Thurmond favored a debtor's power to avoid its agreement, although not unilaterally for 30 days. A House-Senate Conference Report adopted a compromise approach to the conflict by overruling the unilateral power to reject given the debtor in *Bildisco,* and by setting forth certain requirements to be met before rejection of a collective bargaining agreement. The Report was passed over-whelmingly in both Houses and signed into law by the President on July 10, 1984. *See* Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances,* 58 Am. Bankr. L.J. 293, 308-21 (1984).

Here a union challenges the scope of a bankruptcy court's authority under the new law, 11 U.S.C. § 1113 (Supp. II

1984),[1] to allow a Chapter 11 debtor to propose modifications of vested retiree health insurance benefits and—upon the union's refusal to bargain on this issue—to reject the collective bargaining agreement. Throughout this litigation the union has maintained that it is not the retirees' "authorized representative," and that the debtor is required to negotiate any changes in vested benefits directly with the retirees so as to obtain their consent. The union contends that because the debtor insisted

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[1]Code § 1113 provides in pertinent part:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by Title 1 of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the [debtor] shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(Footnote continued on following page)

on bargaining over retiree benefits it violated the good faith requirement of § 1113. As a result, the union argues that it had "good cause" to reject the debtor's proposal.

The bankruptcy and district courts both found that the debtor's proposal to the union to eliminate vested retiree benefits did not constitute a sufficient basis to prevent the debtor from rejecting the labor agreement under § 1113. We agree that vested retiree insurance benefits are a proper subject of bargaining. But since a conflict of interest between active em-

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(Footnote continued from previous page)

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the [debtor] has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing . . . .

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing . . . . If the court does not rule on such application within thirty days after the date of the commencement of the hearing the [debtor] may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

. . . .

(f) No provision of this title shall be construed to permit a trustee to unilaterlly terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

ployees and retirees precludes the union from representing both, we remand the case to the bankruptcy court so that it can appoint a representative for the retirees in these negotiations.

I FACTS

Century Brass Products, Inc. (Century, company, or debtor) came into existence in 1976 when it purchased the major assets of the Scovill Manufacturing Company located in Waterbury and New Milford, Connecticut. Included in the sale were a metals and a general products divisions; the former operated brass mills and the latter manufactured products for the automotive industry and the United States' military program. The purchase price was $30 million, $12 million of which was paid in cash. The remainder was accounted for by the Company's assumption of Scovill's $18 million vested pension and insurance obligations due its hourly and salaried employees.

Since 1976 Century has recognized the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1604 (collectively referred to as the Union) "for the purpose of collective bargaining in respect of wages, rates of pay, hours of employment, and other conditions of employment . . . as the sole and exclusive representative of all hourly and incentive paid production and maintenance employees employed in the metals division including the New Milford plant, the General Products division, and Waterbury services." Following the acquisition, Century and the Union entered into a series of collective bargaining agreements.

From the time of acquisition, Century experienced a downturn in business precipitated primarily by worldwide events that had a negative impact on the American brass industry. Operating losses were incurred for the fiscal years ending in

April 1980-1983. The 1983 loss exceeded $9 million. In fiscal year 1984 Century realized a minimal profit of $523,704 on sales of $141 million, with this small profit due in large part to an insurance settlement. By February 1985 the availability of cash under its financing arrangement approached zero. To deal with its urgent need for operating funds, Century devised plans to reduce operating costs.

Those salaried employees not represented by the Union agreed to wage and benefit reductions totaling $2.3 million. Coupled with this, Century's president met with the UAW on February 25, 1985 to discuss wage and benefit concessions. The company emphasized that unless the UAW agreed to a $2.5 million reduction, the historically unprofitable metals division would be closed. Were this to occur, the inevitable transfer of overhead expenses to the general products division would then jeopardize its existence. On March 3, 1985 the UAW members voted to reject any modifications of the collective bargaining agreement. The following day Century closed the metals division and laid off 700 employees. Attempts by a local Congressman and the Mayor of Waterbury to resolve the conflict were unavailing.

Shortly thereafter, Connecticut Light & Power Company told Century that its electrical power would be turned off in 15 days unless an overdue payment of $2.5 million was made together with a one-month deposit. Connecticut Power also attached Century's bank accounts. On March 15, 1985 Century filed a bankruptcy petition under Chapter 11. Scheduled liabilities totaled over $103 million, while assets listed in the petition amounted to only $71 million. A loss of $7 million was projected for the fiscal year ending April 30, 1985 with anticipated net sales of $62 million and costs of approximately $69 million. The bankruptcy court found that Century faced

$40 million of non-modifiable expenses, leaving $22 million for payment of wages and benefits to all of its non-union salaried and bargaining unit employees. Labor costs under the existing collective bargaining agreement amounted to $19,912,000. Thus, were Century unable to modify its labor agreement, it would be forced to reduce its non-union salaried employees' wages from over $9 million to about $2 million.

After filing its Chapter 11 petition Century initiated a series of meetings with the UAW to discuss the changes essential to the survival of the general products division and to answer questions regarding its Chapter 11 petition. During these informal negotiations held on April 3, 9 and 10, 1985, Century raised the possibility of terminating the pension plan, which cost it approximately $3 million annually. The UAW rejected this proposal. By letter dated April 16 Century's vice president for corporate services requested a formal negotiating session. Century and the UAW negotiating committees met again on April 23.

At this meeting, the company again proposed the following modifications of the collective bargaining agreement: termination of the existing pension plan and institution of a new plan, changes in the medical plan through the addition of a deductible and/or employee contributions, waiver of negotiated changes in wages for 1985 and 1986, and a new vacation plan. The UAW responded that the retiree insurance benefits for those already retired were vested and of lifetime duration.[2] As a con-

[2]Whether retirees' insurance benefits extend beyond the term of a collective bargaining agreement is determined by reference to the terms of the contract and the parties' intent. *See UAW* v. *Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1002 (1984). The bankruptcy court made no finding as to the parties' intent, considering it unnecessary to resolve this issue. We assume, as that court did, that the benefits were of lifetime duration.

sequence, the Union maintained that it could not negotiate these benefits through collective bargaining. Rather, if Century wanted to reduce those benefits, direct negotiation with the retirees to obtain their consent was necessary. On April 26 the UAW and Century met with officials of the Pension Benefit Guaranty Corporation (PBGC) and were advised as to the benefits the PBGC would guarantee to eligible persons should the existing plan be terminated.[3]

The debtor provided the UAW with information on April 29 that detailed the status of the company, its financial data, and its proposed resolution of various operational problems. The parties met again on April 30, May 8, and May 13. The Union reiterated that it could not consider any proposal involving modification of retirees' benefits. At the May 8 meeting Century presented an economic proposal that was part of an overall plan to reduce its projected losses from $7 million in the ensuing year to a profit of $287,000 on sales of $62 on in million. The proposal called for contract modifications and the termination of vested retiree insurance benefits. The UAW wanted

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[3]The PBGC was established by Title IV of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001. This government corporation assumes the obligation of guaranteeing certain employee benefits when a pension plan is terminated. If Century terminates its plan, the pension benefits for all former Scovill employees now retired will be guaranteed by the PBGC. The Basic Retirement Plan provides for $12 per month per year of employee service. At least $11.80 of that benefit is guaranteed. There is a question whether the remaining $.20 is guaranteed for persons who retired after 1979. The fact that an eligible employee has not yet retired or applied for his benefit does not affect any guarantee that is available. For those employees with 30 years service who took early retirement, the $230 supplement payable between ages 60 and 62 is not guaranteed. Only 20 or 30 of the 1,300 retirees receive this supplement.

retiree insurance benefit reductions removed as a topic of negotiation. In response, Century presented a revised opic proposal at the final pre-hearing negotiating session. Because the proposal still called for the complete elimination of cause retiree insurance benefits for approximately 700 pre-acquisition hourly retirees and for a significant reduction in the insurance benefits of 500 post-acquisition retirees, the UAW refused to take Century's offer to its active employee membership for a vote.

On May 17 Century filed the present application in the bankruptcy court for an order pursuant to § 1113 terminating its collective bargaining agreement with the UAW. The Union appeared and objected. From May 31 through July 12 hearings were held on the application. On July 26 the bankruptcy court (Kreckevsky, B.J.) granted Century's application. On November 7 the United States District Court for the District of Connecticut (Cabranes, J.) affirmed the order rejecting the labor agreement and this appeal followed.

II THE UAW'S ARGUMENT

The UAW contends on appeal, as it did below, that the bankruptcy court erred in finding that the debtor had satisfied all the prerequisites to the rejection of the collective bargaining agreement as set forth in § 1113. Specifically, the Union claims that Century's proposed modifications to the collective bargaining agreement that reduce the retirees' vested benefits are inconsistent with § 1113(c). Such modifications are outside the scope of § 1113(c), according to the Union, because the Union is not the "authorized representative" of the retirees, the proposal is not limited to "modifications in the employees' benefits and protections" and the Union therefore has "good cause" to reject such modifications.

As support for this position the UAW relies primarily on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 159-60 (1971). In a non-bankruptcy setting, that case addressed whether an employer's mid-term unilateral modification of retired employees' benefits constituted an unfair labor practice. In order to find such a practice, the court must first find a duty by the employer to bargain with the union concerning retirees' benefits. Such an obligation normally would exist if: (1) the retirees were "employees" as defined in NLRA § 2(3) 29 U.S.C. § 152(3)(4); or (2) these "employees" were members of the collective bargaining unit for which the union is the sole authorized bargaining representative, NLRA § 9(a), 29 U.S.C. § 159(A)(5). *See id.* at 164-66. The Court concluded that retirees do not fall within the statutory definition of employee, *id.* at 165-71, reasoning that the statute was concerned with the collective bargaining rights of workers, not retirees without expectation of further employment. Those labor disputes that Congress made subject to collective bargaining were between employers and active employees, a grouping that clearly does not encompass individuals who have retired from the workforce. *Id.* at 166.

Pittsburgh Plate Glass then considered whether retirees, even though not employees within the meaning of the collective bargaining obligations of the Act, could nevertheless be included within the bargaining unit for which the union was the exclusive bargaining representative pursuant to § 9(A). *Id.* at 171. On that issue it also held that the retirees "were not and could not be 'employees' included in the bargaining unit." *Id.* at 172. Aside from noting that retired workers did not come under the concept of employee as embodied in § 9(a), the Court found lacking sufficient indicia of a mutuality of interest between the retirees and current workers, thereby precluding placing the two in the same bargaining unit. *Id.* at 172-75. It stated:

> Here, even if, as the Board found, active and retired employees have a common concern in assuring that the latter's benefits remain adequate, they plainly do not share a community of interest broad enough to justify inclusion of the retirees in the bargaining unit. Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment. Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.

Id. at 173

Finding that the retirees were neither employees nor members of the collective bargaining unit did not end the analysis because issues that affect non-employees may nonetheless be mandatory subjects of bargaining between a union and employer when the issues involved " 'vitally' affect the 'terms and conditions of employment' of active employees . . . ." *Id.* at 176 (quoting Board decision below at 177 N.L.R.B. 911, 915 (1969)). The Court stated that "the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." *Id.* at 179. Within this rubric, the issue was "[t]he benefits that active workers may reap by including retired employees under the same health insurance contract", benefits which were found to be "speculative and insubstantial at best." *Id.* at 180.

The Supreme Court therefore concluded "that the effect that the Board asserts bargaining in behalf of pensioners would have on the negotiation of active employees' retirement plans is too speculative a foundation on which to base an obligation to bargain." *Id.* at 182. Consequently, it was not a mandatory subject of bargaining. The Union urges that *Pittsburgh Plate Glass* disposes of the present controversy. It points specifically to the statement that even when a union has affirmatively bargained for retiree benefits, "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Id.* at 181 n.20.

In addressing the conflict between labor and bankruptcy law, the bankruptcy court relied on Senator Thurmond's observations that § 1113 had to be interpreted in a "workable manner." *See* 130 Cong. Rec. S 8888 (daily ed. June 29, 1984); *reprinted in* 1984 U.S. Code Cong. & Ad. News 583. According to the bankruptcy judge this meant that "[i]f a union seeks to negotiate benefits for its retirees, and bankruptcy ensues, the union cannot call up the [*Pittsburgh Plate Glass*] doctrine, deny any responsibility for representation of the retirees, and, thereby, entirely frustrate § 1113." Although the district court also reached this result, it simply found that *Pittsburgh Plate Glass* did not support the UAW's position.

We agree in general with the reasoning of the bankruptcy and district courts, but for the reasons set forth below reach a different conclusion as to the representation of retirees in this case.

III *BILDISCO*

Prior to the Supreme Court's decision in *Bildisco*, 465 U.S. 513, we required a debtor to demonstrate that its efforts at

reorganization would be thwarted unless it could reject its collective bargaining agreement as an executory contract under the former Bankruptcy Act, and that the balance of equities favored rejection. *See Shopmen's Loc. U. No. 455, etc.* v. *Kevin Steel Prod., Inc.*, 519 F.2d 698, 707 (2d Cir. 1975) (court focuses only on balance of equities); *see also Brotherhood of Railway, etc.* v. *REA Express, Inc.*, 523 F.2d 164, 167-69 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1976) (applying collective bargaining agreement subject to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, (1982)).

Bildisco resolved a disagreement among the circuits as to the proper standard for rejecting a collective bargaining agreement. The traditional business judgment standard governs the rejection of ordinary executory contracts. *See e.g., Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 550 (1943). But, collective bargaining agreements, as cornerstones of labor law, have traditionally been accorded a higher status than the normal executory contract. Accordingly, the standard for rejecting a collective bargaining agreement is more stringent. *Bildisco*, 465 U.S. at 523. At the same time, *Bildisco* rejected the very strict standard we adopted in *REA Express* because it was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code." *Id.* at 525. Specifically, the Court believed that requiring a court to focus only on whether disallowing rejection would cause the debtor to go into liquidation would subordinate the multiple, competing considerations of Chapter 11 reorganization to one issue only. Moreover, the evidentiary burden necessary to meet such a standard would present difficulties which would interfere with the reorganization process. *Id.*

Instead an equitable standard was devised which requires that the bankruptcy court make four findings before the debtor's peti-

tion for rejection may be granted. These are as follows: (1) the collective bargaining agreement burdens the estate; (2) the equities favor rejecting the labor contract; (3) reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution; and (4) allowing rejection would further the policy of Chapter 11 to permit successful rehabilitation of debtors. *Id.* at 526-27. The parties need not bargain to impasse since determining whether an impasse had occurred would take the bankruptcy court outside the area of its expertise. Rather, the court should make a "reasoned finding on the record" why rejection should be permitted, which would include considering the likelihood and consequences of liquidation without rejection, the reduced value of creditors' claims and subsequent hardships on them, and the impact on the employees. In that process, a court must balance the interests of the affected parties and the equities of the situation as they relate to the success of the reorganization.[4] *Id.* at 526.

The first part of *Bildisco*—which established the proper standard for judicial determinations of when a collective bargaining agreement can be rejected—was decided unanimously.

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[4]The Court emphasized the focus of the bankruptcy court under the equitable standard as it decided whether to grant a rejection petition.

> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue.

But in a controversial 5-4 vote, the Supreme Court further held that a debtor in bankruptcy, prior to obtaining judicial approval to reject the collective bargaining agreement, may unilaterally terminate or modify provisions of the agreement without committing an unfair labor practice under either § 8(a)(5) or § 8(d) of the NLRA. *Id.* at 534.

IV CONGRESSIONAL RESPONSE

This second part of *Bildisco,* which held that a debtor could rescind the labor contract immediately upon filing under Chapter 11, fueled the already noted lobbying effort by organized labor to have Congress amend the law. In fact, on the same day *Bildisco* was decided, Congressman Rodino introduced H.R. 4908 to "clarify the circumstances under which collective bargaining agreements may be rejected." H.R. 4908, 98th Cong., 2d Sess., 130 Cong. Rec. H 809 (daily ed. February 22, 1984). These efforts resulted in the passage of the 1984 Amendments Act of § 1113 of the Bankruptcy Code. That statute now controls the rejection of collective bargaining agreements in Chapter 11 proceedings.

Section 1113 reversed the second part of *Bildisco.* It created an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion. Employers may only propose modifications in an existing labor contract that are necessary to permit an effective reorganization of the debtor. Further, the debtor must propose these modifications to the union before seeking approval to reject its collective bargaining agreement. 11 U.S.C. § 1113(b)(1)(A). Only if the expedited bargaining fails does § 1113 permit a debtor to apply for rejection of the labor agreement. At that

point, a modified version of the unanimously decided first part of *Bildisco* applies.

Since § 1113 was passed within five months of *Bildisco,* it has only a meager legislative history. *See* Rosenberg, *supra,* 58 Am. Bankr. L.J. at 308-21. Congress was unable to agree on a Committee Report to accompany the law. Thus, only the comments read into the Congressional Record by various members of Congress on June 29, 1984—the date the Bankruptcy Amendments and Federal Judgeship Act of 1984 were enacted—are available. P.L. 98-353, 98 Stat. 333. Our analysis will include these statements and the few cases that have interpreted the new law.

V DISCUSSION

A. *Procedure*

Before addressing the substantive standards of § 1113, we turn first to the procedures required by that provision. The new law encourages the collective bargaining process as a means of solving a debtor's financial problems insofar as they affect its union employees. Senator Packwood observed that it "places the primary focus on the private collective-bargaining process and not in the courts." 130 Cong. Rec. S 8898 (daily ed. June 29, 1984). Hence, in order to obtain court approval for rejecting a labor contract, the debtor—after filing its Chapter 11 petition but before seeking such approval—must follow a two-step procedure: first, it must make a proposal to the union accompanied by the kind of relevant and reliable information needed to evaluate it; second, it must bargain in good faith with the union. Only after having demonstrated compliance with the above, without success, may a debtor seek court approval for rejection. § 1113(b)(1) & (2).

B. *Substantive Standards*

If the outlined procedure is followed without resolution, the application for rejection comes before the bankruptcy court which may, under § 1113(c), approve rejection of the labor agreement after making three separate findings: (1) the debtor has made a proposal that satisfies § 1113(b)(1); (2) the employees' authorized representative has rejected such proposal without "good cause"; and (3) "the balance of equities" clearly favors rejection. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 Am. Bankr. L.J. 325, 335 (1984). We examine each of these requirements briefly.

The standards set forth in § 1113(b) require that any proposal include those "necessary" modifications in the collective bargaining agreement "that are necessary to permit reorganization of the debtor . . . ." The use of the word "necessary" twice in § 1113(b)(A) emphasizes the requirement of the debtor's good faith in seeking to modify its existing labor contract. 130 Cong. Rec. S 8898 (statement of Senator Packwood). The court must also assure itself that "all creditors, the debtor and all affected parties are treated fairly and equitably." The purpose is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree.

The meaning of the "good cause" language in the requirement that "[t]he authorized representative of the employees has refused to accept such proposal without good cause," § 1113(c)(2), is best summarized by Senator Packwood. He explained that this "serves to prohibit any bad faith conduct by an employer, while at the same time protecting the employer from a union's rejection of the proposal without good cause." 130 Cong. Rec. S 8898. As Senator Thurmond noted, bargain-

ing in good faith is not intended to import labor law into the bankruptcy forum. Rather, "the intent is for these provisions to be interpreted in a "workable manner". *Id.* at 8888, *reprinted in* 1984 U.S. Code Cong. & Ad. News 583. Finally, the "balance of equities" codifies the unanimous holding set forth in the first part of *Bildisco*, 465 U.S. at 525-26.

Our construction of the statute follows from its plain language and the comments of its sponsors in Congress. Moreover, a number of courts have generally adopted the same approach in interpreting the statute in cases arising under it. *See In re Kentucky Truck Sales, Inc.*, 52 B.R. 797 (Bankr. W.D. Ky. 1985); *Matter of K & B Mounting, Inc.*, 50 B.R. 460 (Bankr. N.D. Ind. 1985); *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985).

C. *Application of Standards to This Case*

Applying these standards to the instant case, we address the threshold question of whether Century made a proposal under § 1113(b)(1)(A) to the employees' authorized representative covered by the agreement. The answer to this question is central to the resolution of the case before us.

The UAW claims that it is not the authorized representative of retired union members who, although covered by the agreement, are no longer active workers. Retirees lack the essential rights of union members. For example, under the Union constitution retirees are members of the union, but they are not entitled to vote in ratification of collective bargaining agreements. In *Pittsburgh Plate Glass*, the Court held that the union had no statutory duty to represent the interests of retirees—as nonbargaining unit members—when making economic decisions for those it does represent. The Supreme Court further observed that vested retirement rights may not, absent the retirees' con-

sent, unilaterally be altered without giving rise to a § 301 Labor Management Relations Act suit for breach of contract. 404 U.S. at 181 n.20.

The bankruptcy court rejected this argument on the ground that the "unavoidable conflict between federal labor law and bankruptcy law" was resolved by the Supreme Court in *Bildisco,* and thus "[t]he union, having voluntarily negotiated benefits for its retired members, has the accompanying responsibility, at least initially, to act in the bankruptcy context as the retirees' representative under § 1113." The district court reached the same result, reasoning that "[t]he Congress that enacted Section 1113 most likely assumed, consistently with *Pittsburgh Plate Glass,* that the rights of retired workers 'vitally affect' the rights of current workers whenever their common employer files for protection under Chapter 11."

We agree with the district court that the rights of retired workers "vitally affect" the rights of active workers within the meaning of *Pittsburgh Plate Glass* when their employer files a Chapter 11 petition. In a Chapter 11 context a refusal to negotiate a reduction in retiree benefits under § 1113 will "vitally affect" active employees in two possible ways: first, it could mean that, as in the case here, they will have to bear a much larger reduction in wages and benefits in order to permit reorganization because of the significant cost of the retiree benefits; second, and more importantly, if retiree benefits cannot be renegotiated, the debtor's reorganization may well fail, in which case the active employees would most likely lose their jobs and benefits.

The district court further correctly observed that the level of benefits provided to retirees affects "the ability of Century Brass to remain in business," an effect far more serious than

any identified by the Supreme Court in *Pittsburgh Plate Glass.* Labor law jurisprudence therefore does provide a basis for finding that a change in retirees' benefits is properly a mandatory subject of bargaining between Century and the UAW. *Pittsburgh Plate Glass,* 404 U.S. at 176-86.

The policies of bankruptcy law also compel this result. It is true that *Pittsburgh Plate Glass* held that retirees are not employees as defined in § 2(3). Yet, if retirees benefits are subjects of bargaining between the union and the employer, and no modification can occur absent the retirees' consent, those retirees must be represented in the negotiations. In order to promote "the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code," *Bildisco,* 465 U.S. at 525, retirees should properly be characterized as "employees" for purposes of applying § 1113. Therefore, they are generally capable of being represented by the union as their "authorized representative."

Concededly, the most "workable" interpretation of § 1113 would logically then require that a union always represent both current and former employees of the debtor in any negotiation for collective bargaining modifications made under Chapter 11. To state such a requirement as an absolute may, as here, pose a serious question as to whether the Union has a conflict of interest. It may not always be appropriate for a union to represent both active and retired workers in modification negotiations. The Supreme Court acknowledged the conflict in *Pittsburgh Plate Glass,* 404 U.S. at 172-73, as discussed earlier, and though it was in another context, this view is relevant when construing § 1113. Therefore, we decline to adopt a *per se* rule holding that a union is always the appropriate party to represent the interests of retirees whose former employer is in a Chapter 11 reorganization proceeding.

When the suitability of representation on account of a conflict of interest is raised the bankruptcy court should make a determination as to whether a conflict actually exists. If a conflict is found, a representative for the class of retirees should be appointed by the bankruptcy judge. Although this departs somewhat from a literal reading of § 1113, well-established precedent for an appointment of this sort is found in other areas of the law. *See, e.g., In re Amatex Corp.*, 755 F.2d 1034, 1043 (3d Cir. 1985) (guardian ad litem appointed for future unknown asbestos victims of debtor); *Adelman on Behalf of Adelman* v. *Graves*, 747 F.2d 986, 987 (5th Cir. 1984) (district court's dismissal of complaint reversed and case remanded for court to consider appointment of guardian ad litem on behalf of incompetent pursuant to Fed. R. Civ. P. 17(c) because of potential conflict with temporary guardian). *In re Amatex Corp.* is useful for our purposes because in that case unknown victims of asbestos poisoning were found to be sufficiently affected by the Chapter 11 reorganization proceedings of an asbestos manufacturer to require representation, particularly where none of the current litigants had interests similar to those of the potential future claimants. 755 F.2d at 1042-43.

The UAW has steadfastly refused throughout the expedited collective bargaining negotiations and all judicial proceedings to represent the retirees. Further, the record amply demonstrates that a conflict of interest exists between active and retired employees. For example, after Century closed its metals division, its workforce was reduced to about 900 employees, 650 of whom the Union represented. The general products division was forced to absorb all of the overhead and many of the metals division's personnel costs. The collective bargaining agreement provided for payment of medical and pension benefits to more than 1,300 retired employees and their families. The workforce reduction at the metals division did not eliminate

these costs. As a result, each of the 650 remaining active bargaining unit employees must now support medical and pension benefits for two retired employees and their families. The active workers are interested in decreasing this heavy financial burden. Conversely, dependent on their pension and health benefits and no longer drawing salaries, retirees want their benefits reduced as little as possible.

Doubtless, it would be more expedient if a union could always represent both active and retired workers. Yet to allow that here would cast doubt on the value of bargained-for rights and call into question the adequacy of pre-deprivation representation in the collective bargaining process. The same union cannot fairly represent two such divergent interests. Here, we conclude that a conflict exists as a matter of law. The UAW therefore may not represent the retired employees. Such must be the rule if, as Congress aimed, bankruptcy law is to be reconciled with labor law principles. Our sister circuit in *Wheeling-Pittsburgh Steel Corp.* v. *United Steel Workers of America*, No. 85-3489, slip op. (3d Cir. May 28, 1986) apparently thought that Congress swung the pendulum back in favor of labor as a reaction to *Bildisco*. The predicate of this opinion is rather that the Senate and House Conferees made the point clear that the road to resolution of the conflict between labor and bankruptcy principles lies in honest compromise.

The debtor as the moving-party seeking rejection of its collective bargaining agreement has the burden of persuasion on the procedural requirements and substantive standards of § 1113. Inasmuch as Century has failed to meet its threshold burden of negotiating with a representative of the company's retired employees covered by that agreement, it therefore has failed to comply with the procedural requirements of § 1113.

VI CONCLUSION

Accordingly, the judgment of the district court is reversed, and the case remanded with instructions that the bankruptcy court appoint a representative for the retired employees of the debtor, and for such further proceedings under § 1113 as are appropriate.

APPENDIX B

November 7, 1985—Decision and Judgment of the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. H 85-756 (JAC)

In the Matter of
CENTURY BRASS PRODUCTS, INC.
Debtor

APPEARANCES:

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APPEAL FROM AN ORDER OF THE U.S. BANKRUPTCY COURT

JOSE A. CABRANES, District Judge:

This matter is before the court on an appeal from the July 21, 1985, order of the U.S. Bankruptcy Court permitting Cen-

tury Brass Products, Inc. ("Century Brass" or "the company") to reject its collective bargaining agreement with the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 1604 ("UAW" or "the union").[1]

I.

The UAW contends on appeal that Bankruptcy Judge Robert L. Krechevsky erred in finding that Century Brass had satisfied all prerequisites to the rejection of a collective bargaining agreement pursuant to 11 U.S.C. § 1113.[2] Specifically, the UAW

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[1]A district court is to act in its appellate capacity in reviewing a bankruptcy court decision authorizing the rejection of a collective bargaining agreement. Consequently, the factual findings made by Judge Krechevsky below cannot be overturned unless they are found to be "clearly erroneous." *See* Bankruptcy Rule 8013; *In re Wheeling-Pittsburgh Steel Corporation,* 120 L.R.R.M. (BNA) 2198 (W.D. Pa. Aug. 28, 1985).

The UAW also renews on appeal its argument that this court erred in refusing to withdraw its reference of this matter to the Bankruptcy Court. The court again rejects this argument for the reasons stated in its oral ruling of June 3, 1985. *See* Certified Official Transcript of a Hearing Conducted June 3, 1985 (filed June 6, 1985) at 53-59. Accordingly, the Bankruptcy Court properly exercised jurisdiction over this matter.

[2]Section 1113(c) of the Bankruptcy Code, 11 U.S.C. § 1113(c) provides that

> [t]he court shall approve an application for rejection of a collective bargaining agreement only if the court finds that:
>
> (1) The trustee [including a debtor in possession] has, prior to the hearing, made a proposal that fulfills the requirements of subsection 1113(b)(1);

(Footnote continued on following page)

argues that Century Brass cannot, consistently with Section 1113(c), propose modifications in the collective bargaining agreement that would reduce the benefits of retirees. Such modifications are not within the scope of § 1113(c), according to the UAW, because the union is not the "authorized representative" of the retirees, the proposal is not limited to "modifications in the employees' benefits and protections," and the union therefore has "good cause" to reject such modifications.

The UAW relies primarily on *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971) (*"Pittsburgh Plate Glass"*), which held that retirees' benefits were not a mandatory subject of bargaining in the circumstances of that non-bankruptcy case. The court finds that *Pittsburgh Plate Glass*, assuming *arguendo* that it has some

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(Footnote continued from previous page)

> (2) The authorized representative of the employees has refused to accept such proposal without good cause; and
>
> (3) The balance of the equities clearly favors rejection of such agreement.

Section 1113(b)(1)(A) of the Bankruptcy Code, 11 U.S.C. § 1113(b)(1)(A), requires that the trustee

> make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary .nodifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

The trustee is obligated by Section 1113(b)(1)(B) to provide the employees' representative with "such relevant information as is necessary to evaluate the proposal."

application in a bankruptcy context,[3] does not support the position advanced by the UAW in the instant case.

The Supreme Court indicated in *Pittsburgh Plate Glass, supra,* 404 U.S. at 179, that one signatory to a collective bargaining agreement may insist that the other signatory bargain over the rights of third parties when those rights "vitally affect[ ]" the terms and conditions of employment of active employees. It is clear that in this case, unlike *Pittsburgh Plate Glass,* the level of benefits provided to retirees "vitally affects" the level of wages and benefits available to current employees and, indeed, the ability of Century Brass to remain in business. Accordingly, the court finds that there is no irreconcilable conflict between *Pittsburgh Plate Glass* and the subsequently enacted Section 1113.

It should be noted that there is nothing in *Pittsburgh Plate Glass* that would prohibit a union from negotiating either to increase or to decrease the benefits of retired workers. *See Pittsburgh Plate Glass, supra,* 404 U.S. at 181 n. 20. That decision merely states that neither an employer nor a union is required to bargain about such matters unless they "vitally affect" the interests of active employees. The Congress that enacted Section 1113 most likely assumed, consistently with *Pittsburgh Plate Glass,* that the rights of retired workers "vitally

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[3]The appellees argue that *Pittsburgh Plate Glass* has no application in a bankruptcy context because the subsequent decision of the Supreme Court in *NLRB* v. *Bildisco & Bildisco,* —— U.S. ——, 104 S.Ct. 1188 (1984), and the enactment by Congress of Section 1113 evidence a clear intent that bankruptcy law take precedence over labor law. The court finds it unnecessary to reach this argument in light of its holding that there is no conflict between *Pittsburgh Plate Glass* and Section 1113.

affect" the rights of current workers whenever their common employer files for protection under Chapter 11.[4]

Accordingly, the court finds that the UAW lacked "good cause" under Section 1113(c)(2) for its failure to negotiate with Century Brass concerning modification of their collective bargaining agreement.

The court likewise declines to find that Century Brass failed to comply with Section 1113(c)(1) because the union was not the "authorized representative" of the retirees or because the company's proposal was not limited to "modifications in the employees' benefits and protections." The appellees note that the legislative history of Section 1113 includes the statement of Senator Thurmond, one of the Senate-House conferees, that "the intent is for these provisions to be interpreted in a workable manner" and not "to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board." 130 Cong. Rec. S8888 (daily ed. June 29, 1984). The most workable interpretation of Section 1113 is that the employer may demand that the union bargain over any "benefits and protections" provided to current and former employees by the collective bargaining agreement so long as the modification of those

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[4]The court finds that footnote 20 of *Pittsburgh Plate Glass* does not dictate a different result. It is concededly true as a general matter that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Pittsburgh Plate Glass, supra,* 405 U.S. at 181 n.20. However, a principal purpose of bankruptcy law is to permit debtors to obtain some relief from their contractual obligations. The UAW has cited no persuasive authority for the proposition that the contractual rights of retirees are not subject to compromise under the bankruptcy laws as are the rights of other creditors.

"benefits and protections" may be necessary to the rehabilitation of the employer. The union necessarily becomes the "authorized representative" of its retirees when it negotiates with the employer on their behalf and cannot later renounce that role when the employer seeks to modify the product of their negotiations under Section 1113.

The court recognizes the difficulties that its holding may present for unions that wish to avoid conflicts of interest in their representation of their different constituencies. However, unions already must attempt to reconcile the conflicting interests of current and retired employees whenever they engage in collective bargaining on behalf of both groups outside the bankruptcy context. It is perhaps understandable that unions find such compromises less distasteful when they are dividing up gains rather than losses.

II.

The UAW argues that, aside from whether Section 1113 requires a union to negotiate on behalf of its retirees, the decision of the Bankruptcy Court should be reversed for a number of other reasons.

First, the union asserts that the package of wage and benefit concessions proposed by Century Brass was "not necessary" to permit its reorganization. The Bankruptcy Court found in the instant case that

> [a]fter considering the debtor's essentially nonmodifiable expenses, approximately $22 million remain for the payment of wages and benefits for all union and nonunion employees. The present annual cost of the union agree-

> ment is $20 million. The debtor's proposals, when combined with the proposed reductions for nonunion employees, project annual cost savings of $7,226,000, for a potential profit of $287,000.

In the Matter of Century Brass Products, Inc., Case No. 2-85-00197 (Bankr. D. Conn. July 26, 1985), slip op. at 14. The Bankruptcy Court therefore determined that "the debtor's proposal contains the modifications necessary to permit the debtor's reorganization to proceed." *Id.* at 16.

It should be noted that "the 'necessary' standard of Section 1113 does not mean 'absolutely essential.' " *In re Wheeling-Pittsburgh Steel Corporation*, 120 L.R.R.M. (BNA) 2198, 2202 (W.D. Pa. August 28, 1985). Consequently, this court cannot conclude, based on its review of the record, that this finding of the Bankruptcy Court was "clearly erroneous."

Second, the union argues that the proposal does not treat all affected parties fairly and equitably. Instead, the union argues that its members will be required to bear a disproportionate share of the burden of the Century Brass reorganization.

The Bankruptcy Court found, in concluding that Century Brass had met its burden of proof on this issue, that

> [s]ubsequent to the filing of its chapter 11 petition, the debtor reduced the number of its management officials from six to two, and the number of salaried employees by twenty percent. Salaried employees now make a contribution toward their medical expense premiums. The creditors' committee asserts that the unsecured creditors have agreed to "shoulder" expected losses of approximately $1.4 million. . . .

November 7, 1985—Decision and Judgment of the United States District Court for the District of Connecticut

In the Matter of Century Brass Products, Inc., supra, slip op. at 16. This court cannot conclude, in light of such evidence, that the Bankruptcy Court erred in finding that the company's proposal treated all affected parties fairly and equitably.

Third, the union contends that Century Brass failed to bargain in good faith by filing for rejection of its collective bargaining agreement only four days after it had presented its proposed contract modifications to the union. However, this court cannot say that the four-day interval is "inherently unreasonable since Section 1113 has no time restraint relative to when the debtor, following the submission of a proposal, may file its rejection application." *In re Wheeling-Pittsburgh Steel Corporation, supra,* 120 L.R.R.M. at 2204. There is no indication in the record that the union was prejudiced in any manner by what it terms "Century's . . . rush to the courthouse." Furthermore, the union has not established any other bad faith by Century Brass sufficient to reverse the decision of the Bankruptcy Court.

Finally, the union argues that the balance of the equities in this case does not clearly favor Century Brass. However, the Bankruptcy Court accepted the "unequivocal" statements of the company and the creditors' committee that Century Brass would go out of business if the proposed modifications were not instituted. These statements and other evidence led the court to conclude that the balance of the equities clearly favored Century Brass because, "[i]n the event of liquidation, obviously, all employees, union and nonunion, will lose jobs." *In re Century Brass Products, Inc., supra,* slip op. at 23.

This court does not intend to trivialize the sacrifices that will be required of the current and retired employees of Century Brass if the reorganization is to succeed. However, it does not

appear that the prospects for the company are so bleak, or the proposed wage and benefit reductions so onerous, as to tip the balance of the equities toward liquidation rather than reorganization. It is, of course, arguable that the company should consider, as a matter of sound and prudent management, permitting those workers who are sharing in its current hardships to likewise share in any future recovery.

Conclusion

For the reasons stated above, the decision of the Bankruptcy Court is affirmed. It is so ordered.

Dated at New Haven, Connecticut, this 7th day of November, 1985.

JOSE A. CABRANES
United States District Judge

November 7, 1985—Decision and Judgment of the United States District Court for the District of Connecticut

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. H-85-756 (JAC)

In the Matter of
CENTURY BRASS PRODUCTS, INC.,

Debtor

JUDGMENT

This cause came on for consideration on appeal from the July 21, 1985 order of the U. S. Bankruptcy Court before the Honorable Jose A. Cabranes, United States District Judge, and on November 7, 1985 a ruling having been filed entitled "Appeal From An Order of the U. S. Bankruptcy Court" affirming the decision of the Bankruptcy Court,

It is ORDERED, ADJUDGED and DECREED that the decision of the U. S. Bankruptcy Court of July 21, 1985, be and is hereby affirmed.

Dated at New Haven, Connecticut, this 7th day of November, 1985.

KEVIN F. ROWE
Clerk, United States District Court

By .....
Deputy in Charge

APPENDIX C

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In Proceedings For An Arrangement Under
Chapter 11
No. 2-85-00197

In The Matter Of:
CENTURY BRASS PRODUCTS, INC.,
Debtor

ORDER APPROVING APPLICATION FOR REJECTION OF COLLECTIVE BARGAINING AGREEMENT

The application of Century Brass Products, Inc., debtor-in-possession, for approval of the rejection of a collective bargaining agreement dated July 12, 1984, between it and Internation Union, UAW and Local 1604, UAW, having been heard, and the court having filed a Memorandum of Decision containing findings of fact and conclusions of law, in accordance with which it is

ORDERED, ADJUDGED AND DECREED that the application for rejection of the collective bargaining agreement referred to in the application be, and the same hereby is, approved, and it is

FURTHER ORDERED that claims seeking to assert damages resulting from such rejection shall be filed on or before October 14, 1985.

Dated at Hartford, Connecticut, this 26th day of July, 1985.

ROBERT L. KRECHEVSKY
United States Bankruptcy Judge

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In Proceedings For An Arrangement Under Chapter 11

Case No. 2-85-00197

In The Matter Of:
CENTURY BRASS PRODUCTS, INC.,

Debtor

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July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

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MEMORANDUM OF DECISION ON APPLICATION FOR REJECTION OF COLLECTIVE BARGAINING AGREEMENT

KRECHEVSKY, B.J.

I.

The matter before the court is an application by a debtor-in-possession, Century Brass Products, Inc., (debtor) to reject a collective bargaining agreement (agreement) with the United Autoworkers Industrial Union (UAW) and its Local 1604 (collectively, "the union").[1] The agreement, dated July 12, 1984, entitled "Strike Settlement Agreement and Memorandum of Agreement Between Century Brass Products, Inc., International Union, UAW and Local 1604, UAW", expires on August 1, 1987.[2] The debtor seeks to alter certain provisions, as hereinafter set forth, for the remaining two years of the

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[1]This proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).

[2]This agreement, entered into after a one-week strike, incorporated by reference the terms of a prior collective bargaining agreement between the same parties effective between August 1, 1981 and June 10, 1984.

agreement. Sections 1113(b) and (c) of the Bankruptcy Code[3] recently enacted by Congress as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 contain the bases

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[3]Section 1113 provides as follows:

(a) The debtor in possession . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(2), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

on which the court shall either approve or deny the debtor's application. *See generally,* Gibson, *The New Law on Rejection of Collective Bargaining Agreements In Chapter 11: An Analysis of 11 U.S.C. § 1113,* 58 Am. Bankr. L. J., 325-348 (1984) [hereinafter cited as "Gibson"]. Section 1113(d)(2) mandates that "[t]he court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing" unless the debtor and the union jointly agree to an extension. The hearing on the debtor's application commenced on May 31, 1984, consumed 16 trial days, resulting in some 2,500 pages of transcript, over 100 exhibits and concluded on July 12, 1985. Each party filed extensive proposed findings, conclusions of law and memoranda with the court on July 16, 1985. This ruling, as a result, is out of compliance with § 1113(d)(2), since the parties, by virtue of their vigorous prosecution of and defense to the application, were unable to conclude the hearing within the thirty-day period contemplated by Congress to be adequate for a hearing and a ruling. The parties had the statutory option of jointly agreeing to an extension of time for the court to act, but have chosen not to do so. Although the debtor and union challenge each other on the issue of good faith conferring, and urge differing conclusions upon the court based upon the evidence received, in fact, there is little difference between them as to their versions of the material events and circumstances which led to this hearing.

II.

The debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code on March 15, 1985, some nine years after its incorporation as a manufacturer with facilities located in Waterbury and New Milford, Connecticut. Although the ostensibly immediate reason for the bankruptcy filing was a

lawsuit started by the Connecticut Light and Power Company garnishing the debtor's bank accounts,[4] the debtor has been in serious financial difficulty almost from its inception. Its bankruptcy petition scheduled liabilities totaling $103,816,245.00 and assets of $71,025,652.00. The debtor had experienced operating losses for its fiscal years ending April, 1980, 1981, 1982 and 1983. In fiscal 1984, the debtor showed a profit of $523,000.00 on sales of $141,000,000.00, due, in large part, to an insurance settlement received during that year. The debtor projects a loss of nine million dollars for fiscal 1985.

The debtor originally purchased its major assets in 1976 from The Scovill Manufacturing Company at a price of thirty million dollars. The purchase price was met by a cash payment of twelve million dollars[5] and by the debtor's assumption of Scovill liabilities set at eighteen million dollars for payment due retired Scovill hourly and salaried employees. This assumption of payments has always been carried on the debtor's financial statements as a liability calculated at the discounted present value of the Scovill retiree benefits. The extensive plant facilities purchased by the debtor can accommodate some 10,000 employees, although the number of the debtor's employees has never exceeded 2,000 at any one time. On the date of the bankruptcy filing, the debtor's employees totaled around 900, of whom approximately seventy percent were hourly employees and members of the union, and thirty percent were salaried employees and not union members.

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[4]On or about March 4, 1985, the Connecticut Light and Power Company, the electricity supplier for the debtor, advised the debtor that electrical power would be discontinued in 15 days if a payment of $2,500,000.00 were not made by the debtor to satisfy overdue payments and a one-month deposit.

[5]Eight million dollars was raised through subscriptions to the debtor's stock.

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

Concurrently with its purchase of the business, the debtor agreed to continue the existing collective bargaining agreement between Scovill and the union. At the time the debtor entered into its present agreement with the union on July 12, 1984, and for all prior years, the debtor conducted its business through two divisions—a metals division and a general products division. The metals division operated brass mills, and the general products division made products for the automotive industry and for the United States military program. Following the signing of the agreement, the debtor began to experience a dramatic downturn in business caused by world-wide events affecting generally the entire American brass industry. On February 25, 1985, Lewis Segal (Segal), the debtor's president, advised the union that the metals division had been historically unprofitable and that unless the union agreed to a 2.5 million dollar wage and benefit reduction, which would be coupled with a 2.3 million dollar comparable reduction for nonunion personnel, the debtor would be forced to close the brass mills. The union members voted, on March 3, 1985, to reject this request, and on March 4, 1985, the debtor discontinued the metals division and closed the mills. By this action, some 700 of the debtor's personnel had their employment terminated. During this period, the offices of both a United States Congressman and the Mayor of Waterbury separately brought the parties to meetings to seek some form of accommodation of their differences, but to no avail.

On May 17, 1985, two months after the filing of the bankruptcy petition, the debtor filed the present application to reject its agreement with the union. The union appeared and filed an objection to the application. The official creditors' committee appeared in support of the debtor's request.

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

III.

Pursuant to § 1113(b)(1)(A), a debtor-in-possession institutes a collective bargaining agreement rejection process by making a proposal, postpetition, to a union. In the present case, prior to making a formal proposal, the debtor's and the union's representatives met numerous times, starting on April 3, 1985, to discuss the effect of the chapter 11 filing on the company and its employees. The full negotiating committees for both the union and the debtor usually attended these meetings. The head negotiator for the union at these meetings, and at all other meetings hereinafter mentioned, was Michael B. Nicholson (Nicholson), a UAW attorney. Frank Santaguida (Santaguida), the debtor's vice president for corporate services, was chief negotiator for the debtor. At meetings held on April 3, 1985, April 9, 1985 and April 10, 1985, among other matters, the parties discussed the possible impact on active and retired employees if the debtor's pension plans were terminated. Santaguida, by letter dated April 16, 1983, requested a formal negotiating session with the union. The letter advised that the purpose of the meeting would be modifications to the collective bargaining agreement. The negotiating teams met on April 23, 1985, and Santaguida outlined the following main areas where the debtor was seeking modifications in the agreement: termination of the bargaining unit pension plan and the institution of a defined contribution plan, changes in the medical plan by including a deductible and/or employees contributions, waiver of wage increases scheduled in 1985 and 1986, and a new vacation plan. He represented that based upon company projections, the debtor could not stay in business very long with the losses it was incurring. Because both the union and the debtor were uncertain as to the effect of the termination of the pension plan, the parties agreed to meet, and did meet, in Washington, D.C. on April 26, 1985, at the offices of the

Pension Benefit Guaranty Corporation (PBGC). At that time, officials of the PBGC advised the parties of the extent to which the PBGC guarantees benefits to covered persons in the event of plan termination.

On April 29, 1985, the debtor sent to the union and to all members of the creditors' committee a lengthy written statement concerning the status of the company and its prospects for the future. This statement included ten pages of financial data covering the debtor's costs of operation, projections as to future earnings and contemplated savings. On April 30, 1985, with this information in hand, the union and the debtor negotiating teams met again, and in addition to discussing the debtor's proposal, the union president orally presented union proposals for possible modification of the agreement.[6] The parties met on May 8, 1985, when the debtor delivered its proposal in writing for the first time to the union, and again, on May 13, 1985, when the debtor presented a slightly modified proposal to the union which read as follows:

"May 13, 1985

CENTURY BRASS PRODUCTS, INC.
COMPANY PROPOSAL TO MODIFY COLLECTIVE BARGAINING AGREEMENT

1. Terminate existing retirement plan.

[6]The union's agreement modifications including the following: (1) The debtor pay the union president's salary and benefits; (2) The debtor pay for several union officials to attend grievance meetings; (3) The debtor settle all pending union grievances; (4) The debtor grant super seniority for certain union officials; (5) The debtor permit the union president or vice-president to enter the debtor's premises without clearance; (6) The debtor modify agreement provisions permitting the company to establish work rules; (7) The debtor pay for ten arbitration cases initiated by the union each year; (8) The debtor offer a health maintenance option.

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2. Establish a defined contribution plan to produce a $12.00 per month times years of future service benefit as a life annuity at age 65. The Company's contribution rate assumes an 8 percent interest rate. The plan is to provide for immediate vesting and immediate employee ownership at death or disability. Other options (e.g. employee right to withdraw from his account) to be considered by the parties.

3. Establish a new vacation schedule as follows:

   A) All regular employees on the payroll as of June 1, 1985 with 90 days of service, will receive vacation time off with pay based on their seniority as of that date.

   B) The amount of time off will be as presently set in our contract.

   C) An employee retiring after June 1 will receive his full entitlement.

   D) An employee laid off after June 1 will receive any unused vacation at the end of the vacation year.

   E) The vacation year shall be from June 1 to June 1.

   F) Vacation computation shall be the employee's June 1, 1985 ASTHE times the number of weeks entitlement times 40.

4. Employees laid off with more than one (1) year of service will be carried on the Medical and Life Insurance programs to the end of the month of layoff.

5. Any increases in medical and life insurance premiums during this agreement will be borne by the employees.

6. Waive the contract changes effective July 1, 1985.

7. Any retiree who asserts a "lifetime benefit claim" reserves the right to assert such claim as a pre-petition claim.

8. Establish a comprehensive medical plan to replace the present Medical/Surgical/Prescription Program. The form of the new plan shall be one of the following alternatives.

OPTION 1

A) For *active employees* a Blue Cross $250/$500 deductible plan with 80%/20% co-insurance up to $3,750, 100% thereafter up to $1,000,000 maximum.

B) Century employees *retired* after April 1976 and *under age 65* to be given an annual total of $750 (paid monthly) for purposes of purchasing medical coverage.[1]

C) Century employees *retired* after April 1976 and *over age 65* to be given an annual total of $420 (paid monthly) to purchase Medicare supplement.

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[1]The Company is willing to redistribute these amounts if the Union wishes to provide a separate benefit for single and married coverage. If this option is chosen, the $750 payment would become approximately $580 for single retirees and $1,160 for married. The $420 payment would become approximately $290 per single retiree and $570 married."

OPTION 2

A) *Active employees* and Century employees who *retired* after April 1976 and are *under age 65* receive the same Blue Cross plan as above.

B) All participants under age 65 (active and retired) to contribute $10.00 per week for participation in the Plan.

C) Century employees *retired* after April 1976 and *over* 65 to be given an annual total of $420 to purchase Medicare supplement (same as Option 1.C).

OPTION 3

The Company and the Union agree to establish a new bargaining unit medical insurance plan by June 1, 1985. Such plan will require a Company contribution of $2,500 per active participating employee between June 1, 1985 and May 31, 1986. Distribution of the benefits of such plan among active employees and retirees to be determined by the parties.

On Behalf of the union, Nicholson responded to the May 13th proposal and stated that since the proposal contained reductions in medical insurance benefits for union members who were retired, the union negotiating committee would not even take the debtor's proposal back to their membership for a vote. This statement by Nicholson concerning any reduction in retired employees' medical insurance benefits contained in the agreement[7] was essentially consistent with other statements at-

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[7]The agreement provided, *inter alia,* in Article XVII—Group Insurance:

> 4. The Company will provide, at no cost to the employees, the insurance specified in this paragraph for each employee under age 65, his spouse under age 65, and eligible dependents under 19 years of age, and each retiree retired under the Century UAW Income Plan who is under age 65 and his spouse who is under age 65:
>
> . . . .

tributed to him at every prior meeting between the union and the debtor. The debtor contended that the union was the representative for all of its members. The parties chose not to negotiate further since the meeting of May 13, 1985 and the filing of the debtor's application for authorization to reject the agreement. The court is aware, however, that subsequent to the start of the hearing, the union membership met and voted affirmatively to authorize its leadership to call a strike, and the debtor has publicly announced that it intends unilaterally to modify the agreement.

IV.

The few reported court decisions that deal with § 1113 have adopted the approach of taking each of the apparent conditions (numbering nine) contained in § 1113 that must be satisfied before a court may authorize contract rejection, and then systematically applying each condition to the facts of the particular matter before the court. *See In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984); *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985). Since that approach appears to be reasonable, and since the parties themselves, in varying degrees, have taken that course in their post-trial memoranda, I shall do likewise.

A.

THE DEBTOR-IN-POSSESSION MUST MAKE A PROPOSAL TO THE AUTHORIZED REPRESENTATIVE OF THE EMPLOYEES COVERED BY SUCH AGREEMENT

Upon initial consideration, it seemed that resolution of this portion of § 1113 would give the least trouble. The union, however, claims that it is not the authorized representative of those persons who are union members and are covered by the agree-

ment, but who are now retired. The union cites for this proposition The National Labor Relations Act 28 U.S.C. § 159(a). I conclude that, for the purposes of § 1113, the debtor's proposal was made to the authorized representative of the employees covered by the agreement, whether those employees are active or retired. For a fuller discussion, *see* Section H, *infra*.

B.

THE PROPOSAL MUST BE BASED UPON THE MOST COMPLETE AND RELIABLE INFORMATION AVAILABLE AT THE TIME OF SUCH PROPOSAL

The debtor's financial records are under the supervision of Joseph Formica, the debtor's vice president for finance and a certified public accountant. All such records are subject to an annual audit conducted by Coopers & Lybrand, Certified Public Accountants. The debtor's latest audited financial statement is for its fiscal year ending April 29, 1984, and Coopers & Lybrand certified that the financial statement conformed to generally accepted accounting principles. When the shutdown of the metals division occurred in March 1985, the debtor had to generate new financial information to cover the impact of its continuing fixed costs formerly allocated to the metals division and now to be fully borne by the general products division. This information was not only internally required, but was necessary for transmission to the debtor's prime lender. The General Electric Credit Corporation. The debtor transmitted this financial information in the form of twelve-month projections for company operation to the union. The most recent information, given to the union on May 13, 1985, was introduced into evidence as Exhibit K. It is a forecasted net income statement for the twelve-month period of May 1985 through April 1986. Exhibit K projects a loss of almost seven million

dollars, if no change in debtor personnel costs is made. It forecasts a net profit of $287,000.00 on sales of $62,000,000.00 if the debtor's requested agreement modifications are put in place. During the course of the hearing, the debtor produced pursuant to the union's request literally thousands of pages of documents (according to Nicholson) which the union financial experts used to test the debtor's assumptions in Exhibit K. Each of the witnesses produced by the debtor to testify as to the debtor's financial condition underwent a meticulous and thorough cross-examination on all financial data utilized by the debtor. Due to the passage of time, some of the Exhibit K monthly forecasts can be measured against actual results of debtor's operation. For example, Exhibit K anticipated net sales of $4,774,000.00 for May 1985; the debtor's actual May net sales were $4,764,849.00. Exhibit K's projected loss for May was $498,000.00. The actual loss was $487,845.00.

I conclude that the debtor's proposal was based upon the most complete and reliable information available at the time of such proposal.

C.

THE PROPOSED MODIFICATIONS MUST BE THOSE NECESSARY TO PERMIT THE REORGANIZATION OF THE DEBTOR

The debtor's present expenses are approximately 111% of revenues, which provides the basis for the forecast loss of almost seven million dollars for the twelve-month period starting May 1, 1985. The debtor lost $487,845.00 in May, and reasonably anticipates a loss of $930,000.00 in June, 1985. Segal testified unequivocally that if the union agreement cannot be modified, the debtor will shortly fail and be forced to liquidate. The

creditors' committee has asserted that it will not permit any possible equity available for unsecured creditors to be consumed for much longer. The debtor depends entirely upon interim financing received from The General Electric Credit Corporation for its cash. The debtor's proposal for wage and benefit modification will affect the financial interest of its hourly and salaried employees in the same manner and reduce medical and pension plans in the same way. After considering the debtor's essentially nonmodifiable expenses, approximately twenty-two million dollars remain for the payment of wages and benefits for all union and nonunion employees. The present annual cost of the union agreement is twenty million dollars. The debtor's proposals, when combined with the proposed reductions for nonunion employees, project annual cost savings of $7,266,000.00[5], for a potential profit of $287,000.00.

The union denies that Exhibit K is a reliable forecast of the debtor's financial position because the debtor chose to exclude and include inappropriate items of cost and income. The union contends, for example, that the proceeds of a completed sale of the idle brass mills, and concomitant reduction in fixed expenses, should be taken into account; that using as an expense item the cost of chapter 11 professional services is improper; and that the present actual insurance costs for medical benefits should not be utilized, but rather the cost of

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[5]

Termination of Pension Plan	Annual Saving
(a) Bargaining unit	$2,959,000.00
(b) Salaried	$ 790,000.00
Cancel Agreement Wage Increases	$ 563,000.00
Reduction of Medical Insurance	$2,954,000.00
	$7,266,000.00

Of the medical insurance cost savings, Segal testified about 1.9 million comes from union members.

such insurance after the debtor has been reorganized. These contentions are not sustainable. The instant issue is whether the debtor will be able to continue in business under the agreement for the period necessary to allow reorganization to take place. What elements of income and cost a financial statement of a debtor already reorganized should contain is not the issue at this stage of the case. As Senator Orrin G. Hatch stated at the time of the enactment of § 1113:

> The conference also discussed at length its intent that this provision ['affected parties are treated equitably'] not become an attempt to devise an entire reorganization plan at a premature stage. We were all aware of the impossibility of even identifying all the creditors and their interests at this early stage of the reorganization effort. Accordingly, this proposal by the business which offers what is necessary to save the business and assure fair and equitable balancing of all the interests should not be construed to require a detailed accounting of how the difficult burden of reorganization is to be distributed amongst competing parties.

130 Cong. Rec. S 8892 (daily ed. June 29, 1984).

The brass mills have been on the market since the fall of 1984 without any pending offers for them, and it would not be responsible to count on the proceeds of their sale being available in the next few critical months. The medical costs in Exhibit K are exactly those which the debtor pays under its existing contract with The Confederation Life Insurance Company. Substantial professional administration expense must be provided for in a proceeding of this complexity.

The necessity of issuing a prompt ruling in this proceeding does not allow for a review in this memorandum of the numer-

ous other union objections to the figures contained in Exhibit K, but all have been considered and found not sufficiently substantial for the court to reject the credibility of Exhibit K, and the testimony of the witnesses who addressed its making. I conclude that the debtor's proposal contains the modifications necessary to permit the debtor's reorganization to proceed.

D.

THE PROPOSED MODIFICATIONS MUST ASSURE THAT ALL CREDITORS, THE DEBTOR AND ALL OF THE AFFECTED PARTIES ARE TREATED FAIRLY AND EQUITABLY

Subsequent to the filing of its chapter 11 petition, the debtor reduced the number of its management officials from six to two, and the number of salaried employees by twenty percent. Salaried employees now make a contribution toward their medical expense premiums. The creditors' committee asserts that the unsecured creditors have agreed to "shoulder" expected losses of approximately 1.4 million dollars ($430,000.00 in May and $930,000.00 in June), in the expectation that the debtor needs some time to form a realistic plan of reorganization. The bankruptcy court can enforce the debtor's representations that modifications of conditions and terms of employment of its employees, union and nonunion, will be done proportionately.

The main thrust of the union's argument against a finding of fair and equitable treatment is that, in the past, the debtor's management has been heavy-handed and insensitive when dealing with employees. The union memorandum states, at page 16-17: "As the record indicates, Century has a history of placing an inordinate burden upon the backs of its employees when

it comes to financial adjustments necessary to insure the health of Century." The union concludes: "The equities do not clearly favor rejection, and thus, even though some cost restructuring will be required, Century's application should be denied."

During the hearing, counsel for the union examined the debtor's officers on past practices concerning granting interest-free loans to certain officers, related-party transactions, and excessive officer salaries. The union may or may not have valid arguments as to past misdeeds by the debtor's present or former management. The Bankruptcy Code provides appropriate procedures through the appointment of an examiner "to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor." *See* § 1104(b) of the Bankruptcy Code. Those matters are not before the court in this proceeding. If a proposal, presently, is fair and equitable in its effect on all parties, I do not believe the court is entitled to find otherwise by considering alleged prior misdeeds of management of the type alleged here. I conclude the debtor has met its burden of proof on this issue.

E.

THE DEBTOR MUST PROVIDE TO THE UNION SUCH RELEVANT INFORMATION AS IS NECESSARY TO EVALUATE THE PROPOSAL

The union denies that the debtor has presented such information, presumably because the debtor did not retain an investment banker to do a feasibility study of the debtor's operations. A union witness stated that the union itself had been

working on a feasibility study in connection with a possible employee buyout of the debtor based, in part, on information given by the debtor. In view of the discussion in Section B, *infra*, I conclude that the debtor has complied with this provision.

F.

BETWEEN THE TIME OF THE MAKING OF THE DEBTOR'S PROPOSAL AND THE TIME OF THE COURT HEARING ON THE DEBTOR'S APPLICATION FOR APPROVAL OF REJECTION, THE DEBTOR MUST MEET AT REASONABLE TIMES WITH THE UNION REPRESENTATIVES

The representatives of the debtor and of the union met formally four times to discuss the debtor's proposals, and they met on four prior occasions to discuss generally the debtor's bankruptcy. The debtor never refused to meet at any other time when the union requested a meeting. The debtor has satisfied this requirement.

G.

AT THE NEGOTIATING MEETINGS BETWEEN THE PARTIES, THE DEBTOR MUST CONFER IN GOOD FAITH IN ATTEMPTING TO REACH MUTUAL SATISFACTORY MODIFICATIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The debtor has carried its burden of proof that it conferred in good faith. It had nothing to gain if it did not do so. Segal testified that the debtor will not be able to survive a strike if the union so decides. He supported this conclusion by stating that due to the nature of the debtor's major customers in the

automotive industry, the right of General Electric Credit Corporation to discontinue its financing in the event of a strike, and the lack of the debtor's financial resources to continue without financing, the company would shut down. Although the court heard extensive testimony on the manner in which the debtor's negotiators presented the proposals for agreement modification, and the union's responses, it is abundantly clear that the failure of both sides to reach an accord in the negotiating was the overriding issue, consistently and continuously raised by the union, that under no circumstances would it agree to any proposal which contained a modification of the benefits under the agreement due its retired members.[9] This issue has been central to this entire proceeding, and it is more fully addressed in the following section.

H.

THE UNION MUST HAVE REFUSED TO ACCEPT THE PROPOSAL WITHOUT GOOD CAUSE

Of the twenty million dollar cost of the agreement, $4,380,000.00 arises from retiree insurance costs and $2,959,000.00 from retiree pension costs. There are approximately 650 active union employees and 1,600 retirees. If the retiree costs are excluded from the debtor's proposals, it is impractical to assume that the active employees alone can or should absorb the necessary wage and benefit modifications to the agreement. The union negotiators, during the May 8, 1985 meeting, conceded that it might be equitable to seek some sacrifice from retired employees, along with all other parties.

[9]Thomas Curtin, who, along with Nicholson, was the main negotiator for the union stated, at the negotiating session held on May 13, 1985, that the parties were "spinning their wheels" without resolving this issue.

Under the UAW constitution, retirees are members of the union but they are not permitted to vote in ratification of collective bargaining agreements. The union takes the following position. It has the authority and responsibility to enforce, on behalf of retirees, benefits under collective bargaining agreements, but it is without authority to negotiate any downward modifications of vested retiree benefits. The retiree medical benefits are vested for the life of the retirees, and are not payable only during the term of the agreement.[10] The union cannot negotiate to reduce the benefits due retired employees without the consent of each individual retiree. Thus, the union concludes, that it was not good faith conferring for the debtor to include in its proposal for union negotiation a reduction in benefits for retirees, and the union had good cause when its representatives refused to accept the proposal and bring it to the membership for a vote. The union further notes that the subject of retiree benefits is a "permissive" not a "mandatory" bargaining subject under federal labor law, and "this framework applies equally in the situation of bankruptcy." Union Memorandum at p. 28.

In support of these propositions, the union cites *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971), and refers the court, in par-

[10]The union, the debtor and the creditors' committee have addressed in their memoranda the question of whether the retirees' medical benefits, in distinction to the retirees' pension benefits, are vested for the life of the agreement or vested for the life of the retiree. I deem it unnecessary to resolve this question at this time. The pension benefits are admittedly vested for life, and the debtor's proposals seek to modify and terminate such benefits. The medical benefits may or may not be vested for life, but even assuming that they are vested for life, the union is the appropriate party under § 1113 to whom the employer must address any modifications of benefits contained in the agreement between the employer and the union, as hereinafter set forth.

ticular, to the following statement made by the Supreme Court:

> Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer . . . [*Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952)] does not require a union affirmatively to represent nonbargaining unit members or to take into account their interests in making bona fide economic decisions in behalf of those whom it does represent. This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. . . . The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.

Id. at p. 181, n. 20.

The Supreme Court, in *Allied Chemical*, decided that for the purposes of 29 U.S.C. §§ 159(a) and 152(3), retired employees are not to be considered employees of the union; e.g., retiree benefits are not a mandatory bargaining subject. But that decision did not consider any issue in the context of bankruptcy, generally, nor, obviously, any congressional act not then in existence. Historically, there has been an unfortunate but unavoidable conflict between federal labor law and bankruptcy law. *See Gibson* at 325-327. Under federal labor law principles, the employer cannot unilaterally change active employee contractual benefits without committing an unfair labor practice. Under bankruptcy law, with court approval, an employer may reject a contract without committing an unfair labor practice, and the parties to the labor contract who suffer

damage file claims against the bankruptcy estate. *NLRB* v. *Bildisco and Bildisco,* 465 U.S. 513, 104 S. Ct. 1188 (1984). If a union seeks to negotiate benefits for its retirees, and bankruptcy ensues, the union cannot call up the *Allied Chemical* doctrine, deny any responsibility for representation of the retireees, and, thereby, entirely frustrate § 1113. The union may have taken its position in good faith, and, as the creditors' committee memorandum suggests, be a "principled" position, but that does not constitute good cause. During the Congressional debate on § 1113, Senator Strom Thurmond remarked as follows:

> The requirement that the union refusal to accept the proposal be 'without good cause' is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board. Again, the intent is for these provisions to be interpreted in a workable manner.

130 Cong. Rec. S 8888 (daily ed. June 29, 1984).

The court, in *In re Salt Creek Freightways, supra,* in commenting on the "without good cause" provision of § 1113, stated:

> [I]t is the opinion of this court that, in order to approve an application for rejection, it is not necessary to find that a Union has rejected the debtor's proposal in 'bad faith' or for some contrary motive. In fact, the Union may often have a principled reason for deciding to reject the debtor's proposal and which may, when viewed subjectively and from the standpoint of its self-interest, be a perfectly good reason. However, the court must review the Union's rejection utilizing an objective standard which narrowly construes the phrase 'without good cause' in light of the main

> purpose of Chapter 11, namely reorganization of financially distressed businesses.

Id. at 840.

A collective bargaining agreement entered into by a union cannot, by virtue of the inclusion of benefits for retired members of that union, thereby excuse the union from its responsibilities under § 1113. The obligations of the union must be construed in light of bankruptcy policies. The union in its memorandum, at p. 12, concedes it has the obligation to present claims on behalf of its retired employees:

> Because retirees are still members of the union, the union has general authority to represent retiree and employee interests on a creditors' committee. The union, as a voluntary membership organization (but *not* as an exclusive representative under the N.L.R.A.) therefore has authority to assert retiree interests on issues regarding the general administration of the estate and protection of the rights of retirees. Because the UAW is a party to the contract under which retiree benefits arise, the union may also assert the interest of retirees in defense of that collective bargaining agreement.

I agree with this statement by the union, except that it does not go far enough. The union, having voluntarily negotiated benefits for its retired members, has the accompanying responsibility, at least initially, to act in the bankruptcy context as the retirees' representative under § 1113.

I conclude that for the purpose of § 1113, the union has rejected the debtor's proposal without good cause.

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

I.

THE BALANCE OF THE EQUITIES MUST CLEARLY FAVOR REJECTION OF THE COLLECTIVE BARGAINING AGREEMENT

The creditors' committee and the debtor unequivocally state that the debtor will go out of business if the proposed modifications are not made. In the event of liquidation, obviously, all employees, union and nonunion, will lose jobs; the employees who retired since 1976 may lose all their medical insurance benefits, not just those lowering of benefits proposed by the debtor. If the contract is rejected, the union remains the exclusive bargaining representative and the debtor will continue to have a duty to bargain in good faith towards achieving a new agreement. *See In re Salt Creek Freightways, supra,* at 842.

The balance of the equities test is a codification of the rule enunciated by the Supreme Court in *Bildisco* v. *Bildisco*. The Court stated:

> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative and it must have great latitude to consider any type of evidence relevant to this issue.

NLRB v. *Bildisco and Bildisco, supra,* 453 U.S. —, 104 S. Ct. 1197.

July 26, 1985—Decision and Order of the United States Bankruptcy Court for the District of Connecticut

Having given due consideration to the extensive evidence placed before the court, and having found that the debtor has established that it has met each of the requirements set out in § 1113 for court approval of the application to reject the collective bargaining agreement, the court concludes that the balance of the equities clearly favors rejection of the agreement.

> The most difficult case is presented when the bankruptcy court believes that the union is honestly mistaken in its assessment of the situation. To minimize this likelihood, the court should make every effort to insure that the union had an adequate and informed opportunity to make a detailed assessment. If, in the final analysis, the court is nevertheless persuaded that the union view is untenable and that the debtor has correctly maintained that rejection is essential, the court should permit rejection.

Bordewieck and Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 Am. Bankr. L. J. 293, 319 (1983).

V.

For the foregoing reasons, the application of Century Brass Products, Inc. for rejection of the collective bargaining agreement is approved. Pursuant to Bankruptcy Rule 9021, the order of the court will be set forth on a separate document.

This Memorandum shall constitute Findings of Fact and Conclusions of Law mandated by Rule 7052. It is

SO ORDERED

Dated at Hartford, Connecticut, this 26th day of July, 1985.

ROBERT L. KRECHEVSKY
United States Bankruptcy Judge

APPENDIX D

June 30, 1986—Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of June, one thousand nine hundred and eighty-six.

Present: HON: IRVING R. KAUFMAN,
HON: RICHARD J. CARDAMONE, Circuit Judges
HON: CHARLES E. WYZANSKI, JR., District Judge.*

85-5092

IN RE: CENTURY BRASS PRODUCTS, INC.,

Debtor.

CENTURY BRASS PRODUCTS, INC.,

Plaintiff-Appellee,

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 1604,

Defendant-Appellant.

CREDITORS' COMMITTEE,

Party-in-Interest.

*Honorable Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

June 30, 1986—Judgment of the United States Court of Appeals for the Second Circuit

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX E

August 13, 1986—Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13th day of August, one thousand nine hundred and eighty-six.

Docket No. 85-5092

IN RE: CENTURY BRASS PRODUCTS, INC.,

Debtor.

CENTURY BRASS PRODUCTS, INC.,

Plaintiff-Appellee,

—v.—

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 1604,

Defendant-Appellant.

CREDITORS' COMMITTEE,

Party-in-Interest.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee Century Brass Products, Inc.

August 13, 1986—Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX F

Statute Involved

SECTION 1113 (11 U.S.C. § 1113)

§ 1113. Rejection of collective bargaining agreements.

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1) the trustee shall meet, at reasonable times, with the authorized

representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-439

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,
Debtor,

CENTURY BRASS PRODUCTS, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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15pp

QUESTION PRESENTED

If an employer and a union are parties to a collective bargaining agreement that provides benefits to retired employees, and modifications in those benefits are necessary to permit the employer to reorganize under Chapter 11 of the Bankruptcy Code, is a proposal containing such modifications made to the union a proposal to the "authorized representative of employes covered by such agreement" within the meaning of 11 U.S.C. § 1113?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were:

Plaintiff-Appellee: Century Brass Products, Inc.*

Defendants-Appellants: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1604.

Party-in-interest: The Century Brass Products, Inc., Official Committee of Unsecured Creditors participated below as a party-in-interest in support of Century Brass Products, Inc.

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* Century Brass Products, Inc. has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

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In The
Supreme Court Of The United States

OCTOBER TERM, 1986

CENTURY BRASS PRODUCTS, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, The Century Brass Products, Inc. Official Committee of Unsecured Creditors ("Creditors' Committee"), which participated in the proceedings below as a party-in-interest, respectfully prays that the Petition For a Writ of Certiorari filed by Century Brass Products, Inc. ("Century") in this case be granted. The Creditors' Committee hereby adopts the Statement of the Case as presented by Century in its Petition.

ARGUMENT

I. THE DECISION BELOW WILL FRUSTRATE THE IMPORTANT OBJECTIVES SERVED BY SECTION 1113.

The potential success of many reorganizations under Chapter 11 of the Bankruptcy Code depends upon the ability of the debtor to modify or reject a collective bargaining agreement which is burdensome to the estate. Following this Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) permitting rejection in certain circumstances and the controversy over the decision, Congress enacted Section 1113 of the Code, 11 U.S.C. § 1113, which establishes a comprehensive procedural and substantive scheme to deal with the issues surrounding the rejection of collective bargaining agreements. One of the most important features of this scheme is the requirement that the parties to the agreement — the union and the debtor — engage in a form of expedited bargaining over contract modifications proposed by the debtor. According to the terms of this provision, this process starts when the debtor makes a proposal to modify the agreement to the "authorized representative of the employees covered by the agreement." As the Bankruptcy Court and the District Court each held, and as clearly indicated by the legislative history underlying the enactment of this section, the "authorized representative" is the union which entered into the agreement. The Second Circuit's decision, however, has fundamentally altered the straightforward and expeditious process envisioned by Section 1113. According to the court, since Century's proposal sought a reduction in benefits for both active and retired employees, a conflict of interest was created which precluded the UAW from representing the retirees. Because of Century's failure to have negotiated with a retirees' representative appointed by the bankruptcy judge, the Second Circuit held that Century had violated the requirements of Section 1113.

As explained in Century's Petition and as explained below, the decision below merits review by this Court. Though the Second Circuit's opinion suggests that separate retiree representation will be the exception rather than the rule, in actuality, since virtually all Section 1113 proposals must seek reductions in retiree benefits, separate representation will be required under the court's rationale in virtually all Section 1113 proceedings. By departing from the language of the statute, the Second Circuit has thus transformed an expeditious and relatively simple process into a complicated, time-consuming and unworkable system involving bargaining between three parties instead of two. The numerous practical and legal problems created by this new Section 1113 procedure, many of which are discussed at pages 10–11 of Century's petition, will serve as a serious disincentive to the willingness of many creditors to permit a reorganization. Indeed, the decision below, which will necessitate protracted and costly future proceedings in this case in order to resolve these issues and to reach a final resolution of the status of the collective bargaining agreement, has and will continue to jeopardize the possible success of this reorganization.

As explained in Century's Petition, the decision below is inconsistent with the terms of Section 1113 and is demonstrably at odds with Congress' intent in its enactment. Moreover, the negotiating process mandated by the decision will be cumbersome and often confused and will create a host of procedural and substantive issues which will take years of litigation to resolve. Ultimately, the Second Circuit's approach will undoubtedly lead to more rejected contracts than negotiated modifications and to more liquidations than reorganizations. This result, which is so obviously in conflict with Congress' objectives in enacting Section 1113, should not be left to stand.

The Creditors' Committee joins in all of the arguments offered by Century in support of its Petition. It is respectfully requested that for those reasons and the reasons discussed below, Century's Petition should be granted.

II. THE DECISION BELOW IS INCONSISTENT WITH SECTION 1113.

Before a debtor may reject a collective bargaining agreement in a Chapter 11 proceeding, the procedural and substantive requirements of Section 1113 must be satisfied. A debtor seeking to modify such an agreement must first "make a proposal to the authorized representative of the employees covered by such agreement" which satisfies the standards articulated in 11 U.S.C. § 1113(b)(1)(A). The Second Circuit's conclusion that Century's proposal to the UAW violated Section 1113 because of a conflict between the union and its retirees and that, consequently, a proposal should also have been made to a separate retirees' representative, is flatly inconsistent with the language of the statute and its legislative intent.

As noted by Century in its Petition, the language of Section 1113 is clear and unambiguous—the debtor is required to "make a proposal to *the* authorized representative of the employees . . ." (emphasis added). The Second Circuit's holding that Century was required to make a proposal to more than one representative simply cannot be squared with the plain language of the act. Moreover, as explained at pages 12-13 of Century's Petition, the legislative history underlying the enactment of Section 1113 demonstrates that Congress intended the terms "authorized representative" and "union" to have the same meaning.

Indeed, if Congress had intended to preclude unions from representing retirees in Section 1113 proceedings—which is indisputably the result of the Second Circuit's decision given the inclusion of retirement benefits in virtually all collective bargaining agreements—Congress would surely have used the term "exclusive representative" rather than "authorized representative" in Section 1113. The term "exclusive" representative is found in Section 9(a) of the National Labor Relations Act (NLRA) which provides that "representatives designated or selected . . . shall be the exclusive representatives of all the employees in such unit." As this Court held in

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 160 (1971), since retirees are not bargaining unit employees under the NLRA, the union cannot be their "exclusive" representative. Therefore, had Congress used this NLRA term in Section 1113, the UAW's position that it could not function as the retirees' representative in a Section 1113 proceeding because it was not their "exclusive" representative might have had some merit.

Instead, however, in enacting Section 1113, Congress required the debtor to negotiate the terms of a proposed contract modification with the "authorized representative" of those whose benefits are covered by the contract. There can be no dispute that a union acts as an "authorized representative" of retired employees covered by the agreement. Indeed, these retirees are members of the union which negotiated the collective bargaining agreement on their behalf. Moreover, unions typically represent retirees and active employees in other contexts as well. For example, in this very proceeding the union represented retirees on the Creditors' Committee notwithstanding its representation of active employees.

By using the term "authorized representative" rather than "exclusive representative" Congress surely intended to require that the signatory to a collective bargaining agreement represent the interests of all whose benefits are covered by the agreement and not just those who are part of the certified bargaining unit. By requiring a debtor to negotiate with both the union and a retirees' representative, the Second Circuit has not only departed "somewhat from a literal reading of § 1113" as conceded in its opinion, it has, in effect, rewritten this key provision of the statute. Congress intended Section 1113 to provide a straightforward and swift process for dealing with modifications and terminations of collective bargaining agreements in a Chapter 11 reorganization. The Second Circuit's revision of Section 1113, as discussed above and as more fully explained in Century's Petition, frustrates Congressional intent by creating a procedural nightmare. The time and expense involved in complying with the new

procedures necessitated by the Second Circuit's decision, and the litigation necessary to resolve the host of practical questions raised by its approach to Section 1113, make it far less likely that the creditors in this proceeding as well as creditors in Chapter 11 proceedings generally will attempt reorganization instead of liquidation.

III. NO CONFLICT OF INTEREST PREVENTS UNION REPRESENTATION OF RETIREES IN A SECTION 1113 PROCEEDING.

As explained above, there is no question that when a union negotiates a collective bargaining agreement which provides for retirement benefits, the union is an "authorized representative" under Section 1113 of both the active and retired employees. The Second Circuit's decision is not to the contrary. Indeed, the Second Circuit's opinion seems to envision union representation of retirees in the vast majority of Section 1113 proceedings. However, alluding to *Pittsburgh Plate Glass*, the court refused to adopt a *per se* rule permitting union representation of retirees in all Section 1113 proceedings finding that "it may not always be appropriate for a union to represent both active and retired workers in modification negotiations." (App. A at 21a). The court proceeded to find that a conflict of interest prevented the UAW from representing both the interests of active workers, who seek to decrease the financial burden of retirees' benefits and the interests of retirees, who seek to protect their benefits from reduction.

The Second Circuit's conclusion that the divergence of interests between active and retired employees prevents union representation of both groups constitutes a significant departure from established principles. As noted by the Second Circuit, it is true that this Court recognized in *Pittsburgh Plate Glass* that even in the normal collective bargaining context, the interests of the two groups were potentially divergent. Nonetheless, this Court specifically noted in that decision that despite this possible conflict of interest, nothing precluded

union representation of both groups during collective bargaining. 404 U.S. at 181, n.20. According to the Court, when a union represents "retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents . . ." 404 U.S. at 173, n.12. The Second Circuit's reliance upon *Pittsburgh Plate Glass* for the proposition that a "conflict exists as a matter of law" (App. A at 23a) when a union undertakes to represent the divergent interests of both active and retired employees is, therefore, entirely misplaced.

The Second Circuit's decision finding a conflict of interest as a matter of law is not only inconsistent with *Pittsburgh Plate Glass*, it also casts doubt upon the legality of the practice of unions throughout the country of representing both groups in a variety of contexts including other bankruptcy proceedings. Indeed, there have by now been numerous proceedings conducted pursuant to Section 1113, many of which are still pending, which logically must have involved proposals to modify the benefits of both retirees and active employees. Unions throughout the country have, presumably, been acting as the "authorized representative" of both groups without objection. In fact, the agreement reached under Section 1113 between the United Steel Workers and the debtor in *Wheeling-Pittsburgh Steel Corp. v. United Steel Workers of America*, 791 F.2d 1074 (3rd Cir. 1986) involved, *inter alia*, retirees' benefits, 791 F.2d at 1078. As far as we are aware, no "retiree representative" has ever been requested or appointed in any Section 1113 proceeding. If the Second Circuit's decision is not reversed, every such Section 1113 proceeding presumably may be subject to attack on conflict of interest grounds.

In addition, and as pointed out repeatedly in this case, the UAW, as is the general practice in bankruptcy proceedings, has represented the interests of retired employees on the Creditors' Committee even as it represented the interests of active employees in other contexts such as the Section 1113 process. Despite the fact that the interests of retirees as creditors of Century and the interests of active employees are potentially divergent, the UAW has never suggested that a

conflict of interest prevented it from representing both groups. Yet the rationale of the decision below would seem to prevent a union from representing retirees in such a context. The decision below merits review by this Court, therefore, not only because it is completely at odds with Congress' intent in enacting Section 1113 but also because it calls into question the propriety of Section 1113 proceedings pending throughout the country as well as the traditional union role of representing active and retired employees in other contexts where their interests may also be divergent.

In addition, though the Second Circuit's opinion envisions union representation of both active and retired employees as the general rule in Section 1113 proceedings, it is difficult to conceive of a situation in which a conflict would not be found under the court's rationale. As pointed out in Century's petition at page 9, virtually all collective bargaining agreements provide for retirement benefits. Section 1113 requires that a debtor make a proposal to modify benefits which treats all affected parties fairly and equitably. A debtor's proposal will, therefore, ordinarily provide for a modification of retirement benefits together with the benefits of all other affected parties. It would seem under the court's analysis that a conflict of interest would always prevent a union from representing both active employees and retirees in this situation. Since this result is completely at odds with the Second Circuit's indication that such representation will be appropriate as a general rule, the decision below may be expected to create extensive confusion and uncertainty among unions, Chapter 11 debtors and the lower courts as to when a conflict of interest exists. Further review by this Court would clarify whether the Second Circuit was correct in finding a conflict of interest in this Section 1113 proceeding and, if so, what the standards are in making this determination.

Finally, even if the Second Circuit were correct in finding a conflict of interest, its conclusion that it was the debtor's burden to take the appropriate steps to avoid the conflict is entirely unfair and illogical. Both active and retired employees

are, after all, members of the union. It is the union's primary duty to protect the interests of all of its members and not that of the employer. If the UAW felt that in this Section 1113 proceeding a conflict prevented it from representing both groups, the UAW should have sought court appointment of a retirees' representative at the commencement of the proceedings. The UAW, of course, never took such a step. Indeed, the union has maintained throughout these proceedings that the retiree benefits in question were not even subject to the Section 1113 proceeding. This position was based on the UAW's argument that the retiree benefits were vested, lifetime benefits and, therefore, could not be reduced without the individual consent of each retiree under the principles of *Pittsburgh Plate Glass*. Given the UAW's failure to have sought the appointment of a retiree representative and its position that retiree benefits were not even subject to Section 1113 negotiations, the Second Circuit's conclusion that Century failed to meet its "threshold burden of negotiating with a representative of the company's retired employees" (App. A at 23a) is entirely mystifying.

It is respectfully submitted that since it is the union's obligation to protect the interests of all of its members, it ought to be the union's burden to determine whether a potential conflict exists and if so to seek separate representation to avoid the conflict. The Second Circuit's opinion offers no justification whatsoever for placing this burden on the employer. Therefore, even if the court below is correct that a conflict of interest existed here, the decision nonetheless merits further review in order to clarify the "threshold burdens" imposed by Section 1113.

CONCLUSION

For all of the foregoing reasons and those stated by Century Brass in its Petition, the Creditors' Committee respectfully suggests that the important questions presented by this case warrant this Court's consideration. Therefore, the Creditors' Committee supports the petitioner's request that its petition for certiorari be granted.

Respectfully submitted,

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No. 86-439

In The

Supreme Court of the United States

October Term, 1986

IN RE: CENTURY BRASS PRODUCTS, INC.,
Debtor.

CENTURY BRASS PRODUCTS, INC.,
Petitioner,

-against-

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW), et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

UAW BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE ISSUE PRESENTED

DID THE SECOND CIRCUIT ERR IN CONCLUDING THAT THE POTENTIAL OF CONFLICT BETWEEN THE INTERESTS OF THE ACTIVE EMPLOYEES AND RETIRED FORMER EMPLOYEES OF A DEBTOR OPERATING UNDER THE BANKRUPTCY CODE SHOULD BE TAKEN INTO ACCOUNT WHEN DETERMINING WHETHER THE UNION WHICH SERVES AS THE BARGAINING REPRESENTATIVE OF THE DEBTOR'S ACTIVE EMPLOYEES SHOULD ALSO BE REQUIRED TO SERVE AS THE "AUTHORIZED REPRESENTATIVE" OF THE DEBTOR'S RETIRED FORMER EMPLOYEES UNDER SECTION 1113 OF THE BANKRUPTCY CODE?

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On Petition for a Writ of Certiorari to the
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UAW BRIEF IN OPPOSITION

The International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), and its Local 1604, by counsel, respectfully pray that the Court **deny** the Petition for Writ of **Certiorari**.

COUNTER-STATEMENT OF THE CASE

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 1604, ("UAW" or "Union") has been recog-

nized as the collective bargaining representative of the hourly production and maintenance employees of Century Brass Products, Inc. ("Century" or "Debtor") since Century was formed in 1976. (6a) By its terms, the current collective bargaining agreement between Century and the UAW extends until at least August 1, 1987. (37a)

On March 15, 1985 Century filed a petition for reorganization under Chapter 11 of United States Bankruptcy Code, 11 U.S.C. § 1101 et seq. (7a) The following month, Century approached the UAW seeking relief from many of the provisions of the collective bargaining agreement. (8a) Century and the UAW met "numerous times" during April and May of 1985 to discuss possible contractual modifications. (42a-43a) Century's first and second written proposals were delivered to the UAW on or about May 8 and 13, 1985, respectively. (43a-46a)

Throughout the negotiations, Century insisted that the UAW agree to concessions for Century's 600 active employees. Century also insisted that the UAW agree, on behalf of approximately 1,200 retirees receiving vested retirement insurance benefits from Century, that those benefits be either eliminated (for approximately 700 retirees) or significantly reduced (for approximately 500 retirees). (9a-10a) UAW negotiators repeatedly informed Century that the UAW believed that it had no authority to agree in collective bargaining to reduce or eliminate vested retiree benefits, and that consent to any such reduction or elimination had to be obtained from the retirees themselves. (8a-9a) See, *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 181 n.20 (1971); *UMWA Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 574-575, n.14 (1982); *Central States Pension Fund* v. *Central Transport*, __ U.S. __, 105 S.Ct. 2833, 2843 and n.18 (1985). In addition, the UAW suggested to Century that it should deal directly with the hourly

retirees, as it was doing with salaried retirees, so as to negotiate and seek their consent to any proposed reduction or elimination of their retirement insurance benefits. (9a) The UAW also suggested the appointment of a representative for retirees in order to facilitate such bargaining. However, Century continued to insist during all of its negotiating sessions with the Union that the UAW bargain over and collectively consent to the reduction and/or elimination of the retirement insurance benefits at issue. (9a-10a)

On May 17, 1985 Century applied to the Bankruptcy Court for rejection of the collective bargaining agreement under Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113. (10a) The UAW argued, *inter alia*, that the Union had "good cause" to reject Century's proposal, and that Century had not bargained in "good faith", and therefore Century had not met the standards for rejection established in Section 1113. Specifically, the UAW argued that Century improperly insisted that the Union collectively bargain away the vested retirement benefits of retirees no longer employed in the bargaining unit represented by the UAW, rather than seeking the consent of the retirees themselves to such proposals. On July 26, 1985 the Bankruptcy Court granted Century's application and approved rejection.

On appeal to the District Court, the Bankruptcy Court's ruling was upheld. On the UAW's further appeal, however, the Second Circuit reached a different result. In doing so, the Second Circuit accepted the UAW's argument that decisions of this Court such as *Pittsburgh Plate Glass*, *Robinson* and *Central States* require that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent." 404 U.S. at 181, n.20. But the Second Circuit disagreed with the UAW's claim that in all cases

debtors must negotiate separately with retirees concerning such benefit reductions.

Instead, the Second Circuit concluded that, on the facts of this case — where retirees outnumbered active employees two to one, where the debtor was admittedly troubled and needed to substantially reduce costs, and where under the Union's rules the retirees had no vote on contract ratification — to require the Union to protect both the rights of employees and retirees in negotiations "would cast doubt on the value of bargained-for rights and call into question the adequacy of pre-deprivation representation in the collective bargaining process." (23a) Accordingly, finding the existence of the kind of conflict of interest "acknowledged" by this Court in *Pittsburgh Plate Glass*, *Robinson* and *Central States* (21a), the Second Circuit concluded that the Union was within its rights in refusing to attempt to do in collective bargaining that which it could not do, that is, to "fairly represent two such divergent interests." (23a) The Second Circuit therefore reversed and remanded the case to the Bankruptcy Court, with directions that that Court, under equitable principles applicable in bankruptcy proceedings, appoint a representative for the hourly retirees.

REASONS FOR DENYING THE WRIT

The Second Circuit held in this case that a bankruptcy court must take into account an asserted conflict of interest before deciding whether in a particular case the labor union representing the debtor's active employees will also be required to serve as the "authorized representative" of the debtor's retired former employees in the negotiations governed by Section 1113 of the Bankruptcy Code. The Court below declined to establish a *per se* rule either requiring unions to serve or forbidding

unions from serving as the "authorized representative" of the debtor's retirees in this context. Instead, the Court below concluded that bankruptcy courts should exercise their equitable power under the Bankruptcy Code to determine on the facts of particular cases whether to appoint a separate representative for the retirees.

Because the present case is the first time this issue has arisen — and because the Second Circuit has stated a rule which, within the framework of that Court's analysis and in practice, is both reasonable and workable and which may be easily followed should similar situations arise in the future — review by this Court is unnecessary. See Part I, *infra*. Moreover, the Petition should be denied here because Congress has indicated, in very recent legislation, its intent to review the questions which arise when a debtor operating under the Bankruptcy Code seeks to reduce or eliminate its obligations to its retired former employees. As we demonstrate in Part II, given the likelihood that the issue presented by this case will be acted on by Congress in its next session, review by this Court is unnecessary.

I.

THE SECOND CIRCUIT, IN A CASE OF FIRST IMPRESSION, STATED A RULE WHICH IS REASONABLE AND WORKABLE.

A. The Second Circuit in this case addressed two questions: (1) does Section 1113 of the Bankruptcy Code allow under any circumstances a union to be required to serve as the "authorized representative" for retired former employees of a debtor if the debtor seeks to reduce through Section 1113 negotiations the vested retire-

ment benefits[1] of those retired former employees; and, (2) should the bankruptcy court, in deciding who should be the retirees' representative in particular cases, take into account an asserted conflict of interest which a union may have if required to serve as the "authorized representative" of both a debtor's active employees and its retired former employees. The Second Circuit answered both of those questions in the affirmative.

Disagreeing with the Union here, the Court below held that, as a matter of statutory construction, Section 1113 ordinarily allows a debtor operating under Chapter 11 of the Bankruptcy Code to require that a labor organization collectively bargain for both active employees and retired former employees over a proposal which includes provisions for reductions in the wages and benefits of the debtor's union-represented active employees, as well as provisions for the elimination or reduction of the vested retirement benefits of the retired former employees of the debtor.

Disagreeing with the Debtor here, the Court below found that the Union in this particular case had a conflict of interest — which the Bankruptcy Court below should have taken into account — which prevented the Union from fairly representing in collective bargaining both the Debtor's active employees and its retired former employees. Thus, the Court below "decline[d] to adopt a *per se* rule holding that a union is always the appropriate party to represent the interests of retirees whose former employer is in a Chapter 11 reorganization proceeding." (21a) Instead, the lower court concluded that "[w]hen the suitability of representation on account of a conflict

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[1] The Second Circuit below, along with both the District and Bankruptcy Courts, assumed for the purpose of its decision that the insurance benefits of the retirees which Century sought to reduce were vested benefits of lifetime duration. (8a, n.2)

of interest is raised the bankruptcy court should make a determination as to whether a conflict actually exists." (22a) Applying that rule to the present case, the Court below found that the UAW here — because the ratio of retirees to active employees was approximately two to one, because the Debtor was admittedly troubled and needed to substantially reduce costs, and because the retirees had no vote on contract ratification under the Union's rules — should not be required to "represent two such divergent interests" because it could not fairly do so. (23a).

B. No other court has reached either of the narrow issues presented to the Second Circuit here. There is therefore no conflict of lower court opinion on these questions and no need for this Court to review the Second Circuit's decision.

In addition, the rule stated by the Second Circuit is both reasonable and workable: when a debtor seeks negotiated reductions in benefits payable to its retirees and the union asserts that it cannot fairly serve as the "authorized representative" of the debtor's retired former employees in that regard, the bankruptcy court must examine the situation and determine whether the union representing the active employees of the debtor may also be required to serve as the "authorized representative" for the debtor's retired former employees.[2]

In directing bankruptcy courts to examine potential conflicts of interest before resolving the retiree represen-

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[2] The UAW Respondents, of course, reserve their disagreement and their right to challenge those portions of the Second Circuit's decision which rejected or did not address arguments raised by the UAW below, such as the lower court's conclusion that Section 1113 should be read to require unions to serve as the bargaining representative of retirees when no conflict of interest is found. Because the Second Circuit's determination on these arguments, and its failure to address certain of the UAW's other arguments, were nondeterminative of any part of the Second Circuit's judgment in this case, however, UAW has not cross-petitioned and instead only opposes granting the Writ.

tation issue in particular cases, the Second Circuit correctly applied well-settled doctrines of both labor and bankruptcy law. In *Pittsburgh Plate Glass*, this Court noted that inclusion of retirees in a bargaining unit "would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the process of collective bargaining." 404 U.S. at 173. See also, *Robinson*, 445 U.S. at 574-575, and *Central States*, 105 S.Ct. at 2843 and n.18. As these decisions teach, the recognition of these "potential . . . severe internal conflicts" — and the desirability of avoiding such conflicts — is deeply embedded in labor law.

In addition, bankruptcy law provides ample precedent for the result reached by the Second Circuit. As the lower court noted, bankruptcy courts are familiar with the process of segregating similarly-situated creditors or parties-in-interest into groups and, when necessary, appointing representatives for particular categories of creditors. Indeed, Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, explicitly gives bankruptcy courts the discretionary power to appoint official "committees" to represent similarly-situated creditors or parties-in-interest. In calling upon the bankruptcy court to examine asserted conflicts of interest on the part of unions and — if necessary — appoint a separate retiree committee or representative, the Court below was therefore merely requiring that bankruptcy courts exercise their established equitable power "to assure adequate representation of creditors or of equity security holders." Section 1102(a)(2), 11 U.S.C. § 1102(a)(2). See also, 11 U.S.C. § 105(a); 11 U.S.C. § 1109; and *In re Amatex Corp.*, 755 F.2d 1034, 1041-1044 (3rd Cir. 1985) and cases discussed therein.[3]

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[3] Bankruptcy courts have been called upon to exercise such discretion in a variety of contexts ranging from the truly extraordinary

(*concluded on page 9*)

C. Petitioner's principal criticism of the rule stated below is that it will allegedly delay the procedures mandated by Congress in Section 1113. This claim is unpersuasive for several reasons.

Petitioner would deprive bankruptcy courts of their traditional discretion to appoint representatives of parties-in-interest and would instead establish a *per se* rule that unions must always represent both active employees and retirees for collective bargaining purposes in Section 1113 negotiations. The rule stated below, however, provides for an examination of asserted conflicts of interest and confirms the authority of the bankruptcy courts to assure the fair and adequate representation of all parties.

It is undeniable that the interests of active employees and retirees will on occasion conflict, as this Court has repeatedly confirmed in cases such as *Pittsburgh Plate Glass*, *Robinson*, and *Central States*. The Second Circuit's decision merely recognizes that these conflicts may arise in the Chapter 11 context as well. Chapter 11 proceedings entail competition among various creditors — including employees, retired former employees, and other creditors — who all seek to maximize their own share of a limited estate. Conflicts may arise in such situations, and must be taken into account. The Second Circuit's decision merely provides a workable method for dealing with the particular conflict which may arise between active employees and retirees.

(*continued from page 8*)

to the routine. In *In re Amatex Corp.*, *supra*, for example, the Third Circuit called upon the bankruptcy court to exercise its equitable power to appoint a representative for a class of what will certainly be many thousands of presently-unidentifiable future victims of asbestosis who will have claims against an asbestos manufacturer. As a less dramatic example, literally *every* Chapter 11 reorganization requires the bankruptcy court to examine the division of similarly-situated creditors into "classes" for purposes of voting on a proposed plan of reorganization. See, 11 U.S.C. §§ 1122-1129.

In addition, the result reached by the Second Circuit is not likely to have any measurable impact on the speed with which bankruptcy courts resolve applications to reject collective bargaining agreements. As Section 1113 itself demonstrates, the proceedings required prior to a court-approved rejection already call for extensive supervision and scrutiny by a bankruptcy court;[4] provision for one additional determination to be made by the bankruptcy court therefore is unlikely to have appreciable impact on the time required to resolve the issues presented by a rejection application.

Indeed, by admonishing bankruptcy courts to ensure at the onset that the bargaining process envisioned by Section 1113 is workable and fair to all concerned parties, and is not tainted by insurmountable conflicts of interest, the Second Circuit's rule *increases* the chances for successful and productive negotiations under Section 1113, instead of unproductive negotiations of the type which occurred here. By permitting resolution of the retiree representation issue at the outset, the Second Circuit's rule allows the parties to enter negotiations without the difficulties and uncertainties which conflicts of interest — such as found here — would create.[5]

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[4] Caselaw emerging under § 1113, for example, calls for the bankruptcy court to apply a *nine-part* test to applications for rejection. (47a)

[5] Petitioner argues that resolution of the retiree representation issue will delay the beginning of negotiations. The realities of the situation, however, belie this argument. For example, Section 1113 itself requires that the debtor make available for analysis extensive information regarding the financial condition of the debtor. 11 U.S.C. § 1113(b). That process alone typically takes significant time. Under the Second Circuit's rule, debtors seeking expedited negotiations may proceed to comply with those informational requirements while the bankruptcy court considers and decides the retiree representation issue. In addition, the sequence of events in the present case demonstrates that adherence to the Second Circuit's rule would likely have

(*concluded on page 11*)

Finally, Petitioner fails to note that Section 1113 itself makes explicit provision for debtors facing truly emergency situations by allowing such debtors to seek interim relief prior to compliance with the standards for rejection. 11 U.S.C. § 1113(e). The rule stated below creates no bar to the availability of interim relief under Section 1113(e). Petitioner has therefore grossly overstated the impact of the decision below on the availability of relief for debtors seeking to reduce their labor costs.

II.

CONGRESS HAS INDICATED BY RECENT LEGISLATION THAT IT WILL ACT ON ISSUES SUCH AS PRESENTED HERE IN ITS NEXT SESSION.

On July 17, 1986 the LTV Corporation and its affiliates filed for protection under Chapter 11 of the Bankruptcy Code. LTV is the nation's second largest steel manufacturer and is the largest manufacturing concern ever to file for Chapter 11 protection.

The day LTV filed its petition, it unilaterally ceased paying various health and life insurance benefits to its retirees. LTV's action prompted immediate Congressional response. See, e.g., H.R. 5490, 99th Cong., 2d Sess., 132 Cong. Rec. H8551-8555 (daily ed., September 29, 1986); House Judiciary Committee Report 99-917, 99th Cong., 2d Sess. (September 29, 1986). One of the end results of this response was the enactment by Congress on October 17, 1986 of legislation requiring debtors to continue to meet their obligation to provide insurance

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(*continued from page 10*)

no effect on the timing of ultimate resolution of a potential rejection application. A full *two months* transpired between Century's Chapter 11 petition and its application to reject the collective bargaining agreement — ample time to allow the bankruptcy court to resolve the matters discussed in the Second Circuit's decision below.

benefits to their retired former employees until May 15, 1987, notwithstanding any provision of Chapter 11 of the Bankruptcy Code.[6]

In enacting this legislation, Congress indicated that its purpose in doing so was to provide interim protection to retirees in bankruptcy proceedings between now and May, 1987, so that Congress could fully consider and act on the range of questions which arise when debtors, such as the Debtor here, seek relief from retiree obligations in the bankruptcy context, and especially under Section 1113. As Senator Thurmond, Chairman of the Senate Judiciary Committee, and one of the sponsors of the enacted legislation, stated on October 3, 1986, upon introduction of the first version of the legislation eventually passed on October 17, 1986:

> This provision will provide this protection until May 15, 1987, in order to give Congress time to act on the broader question of how retiree bene-

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[6] H.J. Res. 738, Amendment No. 2, Title VI, Section 608, as passed by the House and Senate on October 17, 1986, and signed into law by President Reagan on October 18, 1986, provides:

> Sec. 608(a) Notwithstanding any provision of chapter 11 of title 11, United States Code, the trustee shall pay benefits until May 15, 1987, to retired former employees under a plan, fund or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.
>
> (b) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986.
>
> (c) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.

> fits are to be treated under the Bankruptcy Code, and especially under section 1113.[7]

132 Cong. Rec. S.14871-14872 (daily ed., October 3, 1986).

Because Congress has indicated an intent to expeditiously resolve questions with respect to retiree benefits in bankruptcy such as that posed here — and because the Second Circuit's decision poses no conflict with any other decision or authority, and because it also provides a workable solution which may be easily followed pending further legislation — review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, the Court should **deny** the Petition.

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[7] On October 3, 1986 Senator Thurmond, along with Senator Metzenbaum and other senators, introduced predecessor amendments very similar to that eventually enacted by the House and Senate in H.J. Res. 738 on October 17, 1986, and signed by the President on October 18, 1986. See, 132 Cong. Rec. S.14871-14873, 15011-15012, 15048-15049 (daily ed., October 3, 1986). The above-quoted comments of Senator Thurmond were made at that time.